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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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No. 31

JESS LARSON, AS WAR ASSETS ADMINISTRATOR  
AND SURPLUS PROPERTY ADMINISTRATOR,  
PETITIONER

VS.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA

---

PETITION FOR CERTIORARI FILED MARCH 3, 1948

CERTIORARI GRANTED APRIL 19, 1948

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IN THE  
**United States Court of Appeals**

DISTRICT OF COLUMBIA.

No. 9553.

DOMESTIC AND FOREIGN COMMERCE CORPORATION, Mills Building, Washington, D. C., *Appellant*,

v.

ROBERT M. LITTLEJOHN, as War Assets Administrator and Surplus Property Administrator, Railroad Retirement Building, Washington, D. C., *Appellee*.

**JOINT APPENDIX.**

Appeal from the District Court of the United States for the  
District of Columbia.

1. Filed Apr 29 1947 Charles E. Stewart, Clerk.

In the District Court of the United States for the District  
of Columbia.

Civil Action No. 1803-47.

DOMESTIC AND FOREIGN COMMERCE CORPORATION, Mills Building, Washington, D. C., *Plaintiff*,

v.

ROBERT M. LITTLEJOHN, as War Assets Administrator and Surplus Property Administrator, Railroad Retirement Building, Washington, D. C., *Defendant*.

Filed May 15 1947

**Complaint for an Injunction.**

The plaintiff for his complaint herein states to the Court  
as follows:

First. The plaintiff is a corporation organized and existing under the laws of Delaware with its principal office in the Mills Building, Washington, D. C., and is engaged in the exporting and importing business, with particular reference to coal.

Second. The defendant is the duly qualified War Assets Administrator and Surplus Property Administrator.

Third. This case arises under Statutes of the United States, the Surplus Property Act of 1944, as amended, and the Uniform Sales Act. The amount in controversy exceeds \$3,000, exclusive of interest and costs.

Fourth. The plaintiff in 1946 entered into two contracts with the War Assets Administration for the purchase of war surplus coal, located in Texas and adjacent states at various Army camps. This coal had been in storage for approximately two years and was purchased at a price of \$1.75 per net ton, F. O. B. cars at location, terms cash on presentation of railroad weight tickets as shipped, with sight draft on plaintiff, being presented to the First National Bank, Dallas, Texas, together with bill of lading to the order of the plaintiff. Upon entering into these contracts the plaintiff applied for special railroad rates to Texas ports which were granted and for special export licenses outside the regular export allocation system of the U. S. government for newly mined coal, which were granted. The coal was sold through the J. P. Routh Coal Company and the Horgan Fuel Corporation as intermediate purchasers, to various foreign governments. These contracts have been fully and successfully performed, although delays of as long as two months in the giving of shipping instructions were necessitated by the obtaining of special export licenses and the obtaining of special railroad rates.

Fifth. On March 11, 1947, the War Assets Administration Regional Office, P. O. Box 6030, Dallas 2, Texas, addressed a letter to the Domestic and Foreign Commerce Corporation offering an additional 10,000 tons of bituminous coal to the plaintiff. This coal was described by them as follows:



"Stove size, mined near Henryetta, Oklahoma; mining company, moisture content, volatile matter, fixed carbon percent, ash percent, B. T. U.'s per pound and ash fusion temperature are unknown. Stored outside on ground in three windows, for approximately three years, adjacent to a switch track of Frisco line.

"This coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas."

Photostat of the letter is attached hereto as Exhibit A.

On March 13, 1947, Major J. T. Kingsley, President of the Domestic and Foreign Commerce Corporation, wired to Mr. Harry L. Holliday, Regional Director War Assets Administration, Dallas, Texas, and offered to purchase the coal as a continuing part of the former contract. Photostat of this telegram is attached hereto as Exhibit B.

On March 19, 1947, the War Assets Administration Regional Office accepted by letter plaintiff's offer of \$1.75 per ton for approximately 10,000 tons, stating "also your terms of placing \$17,500.00 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted." Photostat of this letter is attached as Exhibit C. This letter also requested that War Assets Administration forms, one being an offer to purchase and one being a sales memorandum, be executed in accordance with the contract made by the exchange of letters and telegrams. These were executed by Major Joseph T. Kingsley as President of plaintiff and mailed to War Assets Administration on March 28, 1947, and photostats of them are hereunto attached as Exhibits D and E.

Plaintiff's covering letter concerning these documents was dated March 28, 1947, and stated that \$5000 was being deposited at the First National Bank in Dallas that day to apply against the first shipment. Letter stated further that the Penn Pocahontas Coal Company would act as exporter for the plaintiff and that the balance of funds necessary to meet War Assets Administration invoices would be

transferred to Dallas immediately when shipment began. It further informed the War Assets Administration that a request had been made for a special freight rate and other steps necessary for the export of this coal had been instituted as in the case of the former contracts. Photostatic copy of this letter is attached hereto as Exhibit F.

4 Sixth. On Tuesday, April 1, 1947, the War Assets Administration wired the plaintiff that

“unless \$17,500 is deposited First National Bank Dallas in payment total quantity of this coal by noon April 4th sale will be cancelled and other disposition made.”

The plaintiff is advised and therefore alleges that it was under no obligation to pay for the coal or make any specific deposits until the presentation of shipping documents. Furthermore it was well known to War Assets Administration that no shipping instructions could be given until the special railroad freight rate had been established and the export license obtained, due to the experience they had gained in the previous contracts. Nevertheless, plaintiff, desiring to comply with any requests made by the government, arranged to have an irrevocable letter of credit in the amount of \$17,500, on the Corn Exchange Bank and Trust Company of New York, payable to War Assets Administration through the First National Bank in Dallas, immediately established by the Penn Pocahontas Coal Company. Plaintiff wired the First National Bank in Dallas on April 4th to notify the War Assets Administration of the establishment of this letter of credit and also wired the War Assets Administration at Dallas on April 4th to the same effect. Photostatic copies of these communications are hereto attached as Exhibits G, H, and I.

Seventh. Nevertheless, on Friday, April 4th, at 9:15 P.M., War Assets Administration Regional Office, Dallas, wired the plaintiff that

“unless \$17,500.00 is deposited with this office or on deposit with the First National Bank of Dallas, Texas, this will



serve as formal notice that sale of 10,000 tons of coal at \$1.75 a ton will be cancelled ten days from this date."

5 This wire was not received by the plaintiff until April 7th. Photostatic copy of the wire appears as Exhibit J. Plaintiff did not understand the reason for this telegram because it had just notified War Assets at Dallas that the letter of credit in the amount of \$17,500 had been established.

Inquiry to the First National Bank in Dallas as to why the letter of credit did not satisfy the War Assets Administration elicited a reply on April 10th that War Assets Administration

"expressed preference for funds to be placed here for payment invoices rather than availability for sight drafts on New York Bank".

See attached photostatic copies as Exhibits K and L.

Eighth. Still endeavoring to comply with the preference of War Assets Administration in all matters, the plaintiff arranged for the amendment of the Corn Exchange Bank letter of credit, dated April 14th, so as to make the draft payable at Dallas. The letter of credit was accordingly amended April 14th and photostats of the original letter of credit and the letter of amendment are attached hereto as Exhibits M and N.

War Assets Administration at Dallas was notified of this amendment making the drafts payable at Dallas by telephone and by letter by the First National Bank of Dallas on April 16, 1947. Photostatic copy of letter is attached as Exhibit O.

Ninth. On April 16, 1947, War Assets Administration's Regional office wired the plaintiff as follows:

"Re sale 10,000 tons coal at \$1.75 ton our credit division has been notified by First National Bank Dallas it does not have sufficient authority to pay for this material upon presentation of invoices. This is formal notification sale is cancelled."

Copy of this telegram is attached as Exhibit P.

6 Tenth. On April 17, 1947, as soon as the wire was received, plaintiff immediately telegraphed as follows:

"We have wire from your Mr. Gray indicating that First National Bank does not have sufficient authority to pay monies against presentation of invoices supported by railroad bills of lading covering our purchase of coal now at Camp Maxey. This coal has been sold to foreign government and port arrangements have been completed for the loading and the First National Bank of Dallas has irrevocable letter of credit from the Corn Exchange Bank and Trust Company, New York City, with full authority to meet your invoices totaling approximately \$17,500.00. We do not understand this action as bonafide letter of credit is established and is usual commercial procedure. We will appreciate your immediate answer and this is to formerly protest cancellation as indicated in your (wire)". (Exhibit Q.)

Eleventh. No reply having been received to this urgent communication, and finding it impossible to reach the Dallas Regional Office on the telephone due to the telephone strike, plaintiff again wired the War Assets Administration at Dallas on April 18, 1947, that it regarded the contract as still in effect. Copy of this wire is attached as Exhibit R. No reply has ever yet been received to either of these telegrams. However, on April 21, 1947, counsel for the plaintiff was able to reach Mr. Frank M. Gray, Chief of the Materials and Supplies Division at Dallas, on the telephone, and was informed by him that he had entered into a new contract selling this coal to the Midland Coal Company of Dallas, Texas.

Twelfth. Plaintiff is advised and therefore alleges that under the terms of the Uniform Sales Act, legal title passed to the Domestic and Foreign Commerce Corporation at the time of the acceptance of its offer by the War Assets Administration's letter of March 19th. Plaintiff further al-



leges that plaintiff is not in default, but has fully complied with all the terms of the contract, and has even gone beyond them in an effort to satisfy defendant's desires.

7 Plaintiff has arranged for an irrevocable letter of credit payable at Dallas, for the full purchase price. Plaintiff was prepared to give shipping instructions within the usual thirty day period allowed exporters by the War Assets Administration. Plaintiff accordingly is advised and alleges that the officers of War Assets are acting illegally in purporting to sell coal to a third party which is the property of plaintiff.

Thirteenth. Plaintiff being advised that it obtained title to the coal at the time of the acceptance of its offer by War Assets Administration on March 19th, immediately entered into negotiation which resulted in its sale to the Penn Pocahontas Coal Company, a company controlled by the same interests as the J. P. Routh Coal Company, at a price of \$2.75 per ton plus 45% of any receipts in excess of \$3.75 per ton on resale by Penn Pocahontas Coal Company. Plaintiff is informed and believes that the Penn Pocahontas Coal Company has resold the coal to an agency of the Portuguese government at a price between \$8.50 and \$9.00 per ton f.o.b. Texas port, which would provide a profit in the neighborhood of \$2.00 per ton for division under the percentage arrangement, after the payment of railroad freight and other expenses.

Fourteenth. Plaintiff alleges that the title to the coal has passed to it and that the War Assets Administration Administrator, through his agents, has purported to enter into a new contract for the sale of this coal, owned by the plaintiff, to another party, to-wit, the Midland Coal Company. Plaintiff is informed and believes that delivery to the Midland Coal Company has not as yet been made. Plaintiff alleges that if the defendant, War Assets Administration Administrator, or his agents, is permitted to make delivery to the Midland Coal Company, the plaintiff will be irreparably damaged in that

8

(1) Its standing with the trade and with the Penn Pocahontas Coal Company will be lost;

(2) Plaintiff's profits under the sale to the Penn Pocahontas Coal Company will be lost and it will be liable in damages to the Penn Pocahontas Coal Company; and

(3) That the amount either of the liability of the plaintiff if it cannot deliver the coal to the Penn Pocahontas Coal Company, of the liability of the Penn Pocahontas to the Portuguese government, or of the profits of the plaintiff in the event of the successful carrying out of its contract and that of the Penn Pocahontas Company with the Portuguese government, whichever of these may result, are impossible of ascertainment. Therefore the plaintiff has no adequate or complete remedy at law.

#### WHEREFORE PLAINTIFF PRAYS:

(1) That this court issue its temporary restraining order against the defendant, his agents, assistants, deputies and employees and all persons acting or assuming to act under their direction, enjoining and restraining them from:

(a) Carrying into effect the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal.

(b) Reselling or attempting to resell this coal to any other person whatsoever than the plaintiff, the legal owner thereof:

(c) Delivering any or all of this coal to any other person.

(2) That upon hearing of motion for a preliminary injunction that this Court continue the temporary restraining order as a preliminary injunction.

(3) That upon final hearing this Court make permanent the preliminary injunction.

(4) That upon hearing of this cause the Court decrees that:

(a) The sale of this coal to the plaintiff by letter of War Assets Administration, dated March 19, 1947, is still valid and in effect.



(b) That the purported sale to the Midland Coal Company is illegal, because title to this coal is in the plaintiff.

(c) That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions.

(d) That the plaintiff may have such other further and different relief as may to the Court seem proper and just in the premises.

(s) T. PETER ANSBERRY,  
1029 Vermont Avenue, N. W.,  
Washington, D. C.,

*Attorney for Plaintiff.*

Subscribed and sworn to before me this 29th day of April,  
A. D. 1947.

CHARLES E. STEWART, *Clerk.*

By H. B. DERTZBAUGH,  
*Deputy Clerk.*

STEPHEN J. McMAHON, Jr.,  
*Of Counsel.*

WAR ASSETS ADMINISTRATION  
P.O. Box 6030  
Dallas 2, Texas

In reply refer to:  
RDL/DSS

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

AIR MAIL

Domestic & Foreign Commerce Corp.  
209 Mills Building  
Washington, D. C.

Gentlemen:

This Agency has for sale on competitive bids,  
10,000 short tons (more or less) of Bituminous Coal, de-  
scribed as follows:

Stove size, mined near Henryetta,  
Oklahoma; mining company, moisture content,  
volatile matter, fixed carbon percent, ash per-  
cent, B.T.U.'s per pound and ash fusion temper-  
ature are unknown. Stored outside on ground in  
three windrows, for approximately three years,  
adjacent to a switch track of Frisco line.

This coal is offered FOB cars, Camp Maxey, north of Paris,  
Texas.

Your early offer on the enclosed blank for all or  
a minimum quantity of 5 cars would be appreciated. Loading  
must be accomplished by March 15. You are urged to inspect  
this coal. Failure to do so will not constitute grounds for  
a claim.

Sincerely yours,

*Frank M. Gray*  
FRANK M. GRAY, Chief  
Materials & Supplies  
Division

Enclosure  
OP blank



GA WUTLONGRAM EL1 DL CHG DOMESTIC AND FOREIGN  
COMMERCE CORPORATION, MARCH 13, 1947 =

PERSONAL,

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

MR HARRY L. HOLLIDAY, REGIONAL DIRECTOR,  
REGIONAL OFFICE, WAR ASSETS ADMINISTRATION, DALLAS, TEXAS=

REFER YOUR PROPOSAL RDL/DSS DATED MARCH 11TH FOR 10,000  
TONS PREPARED STOVE COAL NOW LOCATED CAMP MAXEY, TEXAS.

REQUEST THIS TONNAGE BE ALLOCATED TO US ON SAME TERMS AND  
CONDITIONS AND MADE A CONTINUING PART OF OUR RECENT CONTRACT  
AT SAME PRICE. IMPOSSIBLE LOAD TONNAGE ON OR BEFORE MARCH  
FIFTEENTH AS IT IS NECESSARY TO ESTABLISH SPECIAL FREIGHT  
RATE FOR EXPORT OF THIS FUEL. DUE DOMESTIC SHORTAGES OF  
RAILROAD FUEL, WE, BY AGREEMENT WITH SECRETARY KRUG AND  
DEPUTY DIRECTOR, SOLID FUELS ADMINISTRATION, PERMITTED  
PORTION OF OUR LAST COAL TO BE DIVERTED TO RAILROADS AND IT  
WAS AGREED WHEN FIRST SURPLUS COALS WERE AVAILABLE THEY  
WOULD BE ALLOCATED TO US IN ORDER TO REPLENISH AND FULFILL  
OUR FIRM CONTRACTS. IMMEDIATELY UPON RECEIPT OF ALLOCATION  
OF THIS COAL WE WILL PROCEED TO HAVE FREIGHT RATES  
ESTABLISHED. CONTRACT SHALL BE ON CASH BASIS BASED ON  
RAILROAD SCALE WEIGHTS AS HERETOFORE AND PAYMENT MADE UPON  
PRESENTATION OF YOUR INVOICES TO SAME BANK IN DALLAS.  
PLEASE ANSWER IMMEDIATELY=

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
J.T.KINGSLEY, PRESIDENT.....

..10,000 TONS . MARCH 11TH.....RDL/DSS



EXHIBIT C

WAR ASSETS ADMINISTRATION  
Grand Prairie Regional Office  
Region 26  
P. O. Box 6030  
Dallas 2, Texas

In reply refer to:  
RDL-DSS

*Mem. fac*  
FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

March 19, 1947

AIR MAIL

Domestic and Foreign Commerce Corr.,  
209 Mills Building,  
Washington, D. C.

Attention: J. T. Kingsley, President

Gentlemen:

Your offer of \$1.75 a ton for approximately 10,000 tons of coal is accepted. Also, your terms of placing \$17,500.00 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted. However, it may be to your advantage to deposit the \$17,500.00 with this office for deductions from the amount as shipments are made until this sum is exhausted, or until the coal is completely shipped, whichever occurs first. Any balance of this \$17,500.00 would be immediately refunded upon request.

Please fill in shipping instructions and sign and return the original of the enclosed Sales Memorandum immediately as the camp site is in the process of being cleared.

Your prompt reply to our offering is appreciated.

Sincerely yours,

*for* *Frank M. Gray*  
FRANK M. GRAY, Chief  
Materials & Supplies Division

Enclosure  
Sales Memo (dup)



FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

WAR ASSETS ADMINISTRATION  
REGIONAL OFFICE

P.O. Box 6030 Dallas 2, Texas  
620 Magoffin Avenue El Paso, Texas

OFFER TO PURCHASE

The Domestic & Foreign Commerce Corporation

(Purchaser)

209 Mills Building

(Street address)

Washington 6, D. C.

(City or town)

(State)

Shipping instructions Will follow under separate cover.

Purchaser's business is Exporter

(Kind)

☐ Individual ☐ Retail ☐ Distributor ☐ Manufacturer

Purchased for ☐ Own use ☒ Resale

ITEM No.	QUANTITY	DESCRIPTION	CONDITION	UNIT PRICE	TOTAL
3081269-1-1 (41-121-SSC- 41-47)	10,000 tons	Coal, Bituminous, stove size, mined near Henryetta, Oklahoma.  <i>Copies of original sent to Dallas</i>	Stored outside on ground in three windrows for app. 3 years.	\$1.75	\$17,500.00

Accepted:

By \_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

Date \_\_\_\_\_

PLEASE DELIVER THE ITEMS STIPULATED ABOVE ACCORDING  
TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE.

PURCHASER The Domestic & Foreign Commerce Corp.

BY Major J. T. Kingsley, President



## EXHIBIT D

### TERMS AND CONDITIONS OF SALE

War Assets Administration reserves the following rights in connection with the sale of surplus property:

- (a) To reject any and all bids and offers;
- (b) To withdraw all or any part of the property included in the sale at any time prior to a Contract of Sale; and
- (c) To reserve the right to require a deposit.

Prospective purchasers are urged to inspect property and arrangements for inspection may be made with the Regional Office of War Assets Administration

### CONDITIONS OF SALE

The term "Sales Memorandum" used herein shall include War Assets Administration's forms of Sales Documents and Sales Orders.

All property will be sold by War Assets Administration subject to the conditions described below.

The Sales Memorandum and these standard conditions of sale constitute the entire agreement between the parties with respect to the sale of the property specified in the Sales Memorandum. No variations from or modifications thereof, and no representations made or warranties given by any representative, agent, or employee of Seller in variance thereof shall be of any effect unless specified in writing and included in the Sales Memorandum. The standard conditions of sale are as follows:

- (a) Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser.
- (b) Seller makes no warranty, either express or implied, with respect to the property covered by the Sales Memorandum, except (a) Seller warrants it has the right to transfer title to the property; and (b) Seller warrants the accuracy of the description of the property, provided however, that if the property is described as new, Seller warrants only that it has not been used. Seller's liability under this paragraph shall not exceed amount of purchase price.
- (c) Sales are subject to such adjustment upon the request of the Purchaser as the War Assets Administrator, or his authorized representative, in his sole discretion, may determine to be equitable under the circumstances, and any such determination shall be final. Requests for such adjustment will be considered only if filed in writing in the office of War Assets Administration responsible for the sale within fifteen (15) days (or such additional period as may be allowed in writing by the Administrator or such representative) after removal of property by Purchaser or delivery by a common carrier at the original destination.
- (d) In case of error in the extension of prices, the unit price will govern.
- (e) Unless otherwise specifically stated in the Sales Memorandum, all sales are made f. o. b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser. Specific shipping instructions from Purchaser must be received by the regional office of War Assets Administration responsible for the sale within ten (10) days from the date of the Sales Memorandum; or if prior to the expiration of said 10-day period Purchaser notifies Seller that he will remove the property, such removal must be effected within fifteen (15) days of the Sales Memorandum. Seller will not ship the property to more than one destination except in cases where such separate shipments each constitute a carload, truckload, or a minimum if established by WAA.
- (f) If the property covered by Sales Memorandum is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (e) above for removal or the issuance of shipping instructions, Seller's liability shall, at election of Seller, be limited to the replacement of the property lost, damaged or destroyed or refunding any amount paid by Purchaser therefor.
- (g) If purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in paragraph (e) above, the risk of loss, damage, or destruction of the property shall be upon Purchaser. In the event of such failure Purchaser shall, upon demand, pay to Seller reasonable storage charges if the property is stored on premises owned or controlled by the Government, or Seller may store the property elsewhere for the account and at the expense of Purchaser. Seller may also, upon such failure or in the event of default on the part of Purchaser in making payment or otherwise, upon giving ten (10) days written notice to Purchaser, rescind the sale, or resell the property for the account of Purchaser upon such terms and conditions as it deems proper, and Purchaser shall, upon demand, pay to Seller the amount of all losses and expenses incurred by reason of such failure or default. The exercise by Seller of one or more of the rights herein specified will not preclude Seller from exercising any other rights it may have against Purchaser.
- (h) Seller shall not be liable for delay in shipping or loading the property covered by the Sales Memorandum due to causes beyond its control and without its fault or negligence, including without limitation, acts of God or the public enemy, acts or requests of any State or local governmental officer or agent purporting to act under authority, floods, fires, epidemics, quarantine restrictions, riots, sabotage, freight embargoes or failures, strikes, lock-outs, and disputes with workmen.
- (i) Seller reserves the right to cancel the contract of sale without liability in cases where Purchaser is an agent acting for an undisclosed principal if such action is determined by the War Assets Administration in the public interest.
- (j) No Member of, or Delegate to, Congress, or Resident Commissioner of the United States of America shall be admitted to any share or profit in the contract of sale or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.



Address: P.O. 6030, Dallas 2, Texas

SALES DOCUMENT NO.

SOLD TO Domestic and Foreign Commerce Corp.  
209 Mills Building  
Washington, D. C.

FILED

APR 29 1947

CHARLES E. STEWART, Clerk

SHIP TO: SHIPPING INSTRUCTIONS - ROUTING AND DELIVERY

SALE DATE	SALE NO.	TERMS Cash on presentation of wt. tickets as shipped	CONTRACT OR P. O. NO.	TYPE OF BUSINESS Export	PROPOSED USE Resale
REGION 26	SOLD BY DISTRICT	SALESMAN	PROGRAM	DISPOSAL TYPE 03	SALES SECTION 73
PROPERTY LOCATION Camp Maxey, Texas		SEND DELIVERY ORDER TO: Surplus Property Officer Camp Maxey, Texas		DEC. AGENCY - ADDRESS - PLANCOR NO. Camp Maxey, Texas	

ITEM NO.	Cap. No. or Decl. Serial, Page & Line	PROPERTY DESCRIPTION AND CONDITION	UNIT OF MEAS.	UNIT SALES PRICE	NUMBER OF UNITS SOLD	SALES AMOUNT
3081269-1-1 (41-121-830-41-47)	5	Coal, Bituminous, stove size, mined near Henryetta, Oklahoma. Stored outside on ground in three windrows for approximately three years, adjacent to switch track of Frisco line.	ton	1.75	10,000 (approx.)	17,500.00
				SALES TAX		
				TOTAL AMOUNT	17,500.00	

EXHIBIT B

CERTIFICATE OF PURCHASER: THE PURCHASER CERTIFIES THAT IT IS REGULARLY ENGAGED OR IS ABOUT TO ENGAGE IN THE BUSINESS OF HANDLING PROPERTY OF THE TYPE SPECIFIED ABOVE, IN THE CAPACITY INDICATED BELOW, EXCEPT WHERE ITS OPERATIONS ARE OTHERWISE DESCRIBED IN AN ATTACHMENT HERETO.

☐ INDUSTRIAL OR COMMERCIAL USER ☐ WHOLESALE ☐ LARGE RETAILER ☐ SMALL RETAILER ☐ EXPORTER

THE ABOVE PROPERTY IS SOLD SUBJECT TO THE ABOVE TERMS AND TO THE CONDITIONS OF SALE ON REVERSE SIDE OF COPY NO. 2

*Domestic Foreign Commerce Corp.*  
*Henryetta, Okla.*  
*4/29/47*



## EXHIBIT E

### CONDITIONS OF SALE

The Seller's Sales Memorandum and these Conditions of Sale constitute the entire agreement between the parties with respect to the sale of the property specified in the Sales Memorandum. No variations therefrom or modifications thereof, and no representations made or warranties given by any representative, agent or employee of Seller in variance thereof shall be of any effect unless specified in the Sales Memorandum.

- (1) Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, Cashier's check, or money order prior to shipment of the property or its removal by Purchaser.
- (2) Seller makes no warranty, either express or implied, with respect to the property, except (a) Seller warrants it has the right to transfer title to the property; and (b) Seller warrants the accuracy of the description of the property, provided however, that if the property is described as new, Seller warrants only that it has not been used. Seller's liability under this paragraph shall not exceed amount of purchase price.
- (3) Sales are subject to such adjustment upon the request of the Purchaser as the War Assets Administrator, or his authorized representative, in his sole discretion, may determine to be equitable under the circumstances, and any such determination shall be final. Requests for such adjustment will be considered only if filed in writing in the office of Seller responsible for the sale within fifteen (15) days (or such additional period as may be allowed in writing by the Administrator or such representative) after removal of the property by Purchaser or delivery by a common carrier at the original destination.
- (4) In case of error in the extension of prices, the unit price will govern.
- (5) Unless otherwise specifically stated in the Sales Memorandum, all sales are made F.O.B. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser. Specific shipping instructions from Purchaser must be received by the Regional Office of Seller responsible for the sale within ten (10) days from the date of the Sales Memorandum; provided, however, that if prior to the expiration of said ten-day period Purchaser notifies Seller that he will remove the property, such removal must be effected within fifteen (15) days from said date. Seller will not ship the property to more than one destination except in cases where such separate shipments each constitutes a carload or truckload, or minimum lot if established by Seller.
- (6) If the property is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (5) above for removal or the issuance of shipping instructions, Seller's liability shall, at election of Seller, be limited to the replacement of the property lost, damaged or destroyed or refunding any amount paid by Purchaser therefor.
- (7) If Purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in paragraph (5) above the risk or loss, damage or destruction of the property shall be upon Purchaser. In the event of such failure Purchaser shall, upon demand, pay to Seller reasonable storage charges if the property is stored on premises owned or controlled by the Government, or Seller may store the property elsewhere for the account and at the expense of Purchaser. Seller may also, upon such failure or in the event of default on the part of Purchaser in making payment or otherwise, upon giving ten (10) days written notice to Purchaser, rescind the sale, or resell the property for the account of Purchaser upon such terms and conditions as it deems proper, and Purchaser shall, upon demand, pay to seller the amount of all losses and expenses incurred by reason of such failure or default. The exercise by Seller of one or more of the rights herein specified will not preclude Seller from exercising any other rights it may have against Purchaser.
- (8) Seller shall not be liable for delay in shipping or loading the property due to causes beyond its control and without its fault or negligence, including without limitation, acts of God or the public enemy, acts or requests of any State or local governmental officer or agent purporting to act under authority, floods, fires, epidemics, quarantine restrictions, riots, sabotage, freight embargoes or failures, strikes, lock-outs and disputes with workmen.
- (9) Seller reserves the right to cancel this contract of sale without liability in cases where Purchaser is an agent acting for an undisclosed principal if such action is determined by the War Assets Administrator to be in the public interest.
- (10) No Member of, or Delegate to, Congress, or Resident Commissioner of the United States of America shall be admitted to any share or profit in this contract of sale or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.



FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

Reference:

March 8, 1947

DL-233

War Assets Administration  
Great Prairie Regional Office  
Region 26  
P.O. Box 6030  
Dallas 2, Texas

Attention: Mr. O. E. Hawley

Gentlemen:

With further reference to my telegram of the 28th relative to an original offer to purchase as indicated in our telegram of March 13th and accepted by you in your letter dated March 19th approximately 10,000 tons of surplus coal now at Camp Maxey, Texas on the basis of \$1.75 per ton, f.o.b. cars. Your letter of the 19th was acknowledged by my office during my illness and the delay in the acknowledgement is regretted.

The purchase of this coal is stipulated as cash on presentation of railroad scale weight tickets showing gross, tare, and net weights attached to the original bills of lading when presented to the First National Bank of Dallas, Dallas, Texas. There has been deposited as of noon today with the First National Bank of Dallas, \$5000.00 to apply against the first shipments of this coal. This deposit was forwarded by the Bank of Manhattan on orders from the Penn-Pocahontas Coal Company, New York City who will act as exporters for this company in the handling of this coal; and immediately this shipment begins to move, the balance of the funds necessary to meet your invoices upon presentation at the bank will be transferred by the New York bank to the First National Bank of Dallas.

It is requested that when shipments are made that the original bills of lading with duplicates thereof be prepared; the originals presented to the bank with the invoices from the War Assets Administration indicating the number of cars and not tons upon which you will draw against the stipulated fund, and the copy of the original bill of lading to be sent to our agent at the Gulf port which will be indicated to you with shipping instructions.

Request has been made to the Southwestern carriers to establish an appropriate freight rate in order that this coal



War Assets Administration

-2-

March 28, 1947

might move to the Gulf port for export. The usual procedure in securing a steamer for this coal has been placed in operation, and we will endeavor to expedite the assignment of this vessel.

We have notified the First National Bank of Dallas, Dallas, Texas that this deposit has been made and the purpose thereof which you can confirm by contacting the officials of that bank. It is specifically stipulated that these funds are for no other purpose except to meet the invoices presented by you in accordance with the terms of this contract.

# There is attached hereto the original Sales Memorandum and the Offer to Purchase for your records. #

# We will advise you shipping instructions immediately upon our notification of the steamer's assignment. #

Very truly yours,

THE DOMESTIC & FOREIGN COMMERCE CORP.

J. T. Kingsley  
President

JTK:hv  
Enc.



CLASS OF SERVICE  
This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

BY DIRECT W1

EXHIBIT G

# WEST UNION

A. N. WILLIAMS  
PRESIDENT

NL - Night Letter

LC - Deferred Cable

NLT - Cable Night Letter

Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

LONG WU A86 GOVT PD=WUX DALLAS TEX APR 1 1947 936 A

J T KINGSLEY.

DOMESTIC AND FOREIGN COMMERCE CORP:

FILED

APR 29 1947

CHARLES E. STEWART

Clerk

=REFERENCE YOUR OFFER TO PURCHASE 10,000 TONS COAL AT \$1.75  
TON, FIRST NATIONAL BANK DALLAS REFUSES TO GUARANTEE PAYMENT  
FOR FULL AMOUNT UNLESS \$17,500 IS ON DEPOSIT THEIR BANK FOR  
THIS PURPOSE. UNLESS \$17,500 IS DEPOSITED FIRST NATIONAL BANK  
DALLAS FOR PAYMENT OF TOTAL QUANTITY THIS COAL BY NOON APRIL 4  
SALE WILL BE CANCELLED AND OTHER DISPOSITION MADE. END/RDL-

•DSS/SP-1/LERER•

FRANK M GRAY

CHIEF MATERIALS AND SUPPLIES DIVN WAA DL

.10,000 \$1.75 \$17,500 \$17,500 4 END/RDL-DSS/SP-2-

==SP-1/LERER. 1108A



E.2 DL CHG TO DOML IC AND FOREIGN COMME JE CORP APRIL 4 1947  
2117P

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

MR. WILBUR H. ROBERTS  
ASSISTANT CASHIER FIRST NATIONAL BANK OF DALLAS  
DALLAS TEXAS=

THE PENN POCAHONTAS COAL COMPANY NEW YORK HAVE PLACED TO  
OUR CREDIT IRREVOCABLE LETTER OF CREDIT IN THE AMOUNT OF  
\$12,500 IN ADDITION TO THE FIVE THOUSAND DOLLARS CASH DEPOSIT  
FOR THE SPECIFIC PURPOSE OF MEETING INVOICES RENDERED BY WAR  
ASSETS ADMINISTRATION COVERING PURCHASE OF APPROXIMATELY TEN  
THOUSAND TONS OF COAL WHEN SAID INVOICES ARE SUPPORTED BY THE  
ORIGINAL BILLS OF LADING WITH RAILROAD SCALE WEIGHT TICKETS  
ATTACHED THERETO. PENN POCAHONTAS ALSO ADVISED YOU OF THE  
PURPOSE OF THIS TRANSACTION. WE HAVE NOTIFIED WAR ASSETS  
ADMINISTRATION OF THIS MATTER. WILL YOU DO LIKEWISE=

DOMESTIC AND FOREIGN COMMERCE CORP  
J. T KINGSLEY PRES.

.\$12,500 \$5,000

EXHIBIT H



OPR. HOW LONG WILL IT TAKE A DL  
TO DALLAS TEXAS V.M.N PLS SHOULD GET THERE WITHIN ONE OR TWO  
HOURS

EL1 STRT MSG CHG TO DOMESTIC AND FOREIGN COMMERCE APRIL 4  
1947 (1210P)

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

MR HARRY HOLLIDAY  
REGIONAL MANAGER WAR ASSETS ADMINISTRATION  
DALLAS TEXAS

YOUR WIRE APRIL FIRST. WE HAVE PLACED WITH THE FIRST NAT  
IONAL BANK OF DALLAS, DALLAS, TEXAS LETTER OF CREDIT COVERING  
THE BALANCE OF \$12,500 FOR THE SPECIFIC PURPOSE OF MEETING  
YOUR INVOICES SUPPORTED BY THE RAILROAD BILLS OF LADING WITH  
SCALE WEIGHT TICKETS ATTACHED THERETO AS INDICATED IN PUR  
CHASE AGREEMENT COVERING APPROXIMATELY 10,000 TONS COAL STORED  
AT CAMP MAXEY TEXAS. THIS PLACES ON HAND IN THE FIRST NATIONAL  
BANK DALLAS THE FULL AMOUNT OF \$17,500 TO MEET THIS PURCHASE.  
PLEASE ACKNOWLEDGE=

DOMESTIC & FOREIGN COMMERCE CORP

J. T. KINGSLEY PRES.

\$12,500 + 10,000 = \$17,500

*Order to Dallas*  
*12/21*

EXHIBIT 1



CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

EXHIBIT J

# V.V. UNION

A. N. WILLIAMS  
PRESIDENT

MBOLS

y Letter

NL = Night Letter

LC = Deferred Cable

NLT = Cable Night Letter

Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

DB80

D. B 646 NL GOVT PD=WUX DALLAS TEX 4

1947 APR 4 PM 15

DOMESTIC FOREIGN & COMMERCE CORP. ATTN MR KINGSLEY=

MILLS BLDG WASHDC=

UNLESS \$17500.00 IS DEPOSITED WITH THIS OFFICE OR ON DEPOSIT WITH FIRST NATIONAL BANK OF DALLAS TEXAS THIS WILL SERVE AS FORMAL NOTICE THAT SALE OF 10000 TONS OF COAL AT \$1.75 A TON WILL BE CANCELLED TEN DAYS FROM THIS DATE

END/RDL/DSS/SP-4/LENER=.

FILED

APR 29 1947

CHARLES E. STEWART, Clerk

FRANK M GRAY ACTING CHIEF MATERIALS & SUPPLIES DIV

WAR ASSETS ADMN.

\$17500.00 10000 \$1.75 END/RDL/DSSGXSPGARXL'ERER..

*Recd 4/11 830 AM*

22

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE



EXHIBIT K

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

# WESTERN UNION

A. N. WILLIAMS  
PRESIDENT

FILED

APR 29 1947

DL - Day Letter
NL - Night Letter
LC - Deferred Cable
NLT - Cable Night Letter
Ship Radiogram

CHARLES E. STEWART, Clerk

GA WUD130 48/47 COLLECT=FL DALLAS TEX APRIL 10 1133A

J T KINGSLEY, PRESIDENT=DOMESTIC & FOREIGN COMMERCE CORP=

RETEL 9TH CORN EXCHANGE WIRE 4TH RECEIVED ADVISING OPENING  
CREDIT 28861 \$17,500.00 BUT ACTUAL CREDIT NOT YET RECEIVED  
AND WAR ASSETS AWAITING ITS ARRIVAL. THEY EXPRESS PREFERENCE  
FOR FUNDS TO BE PLACED HERE FOR PAYMENT INVOICES RATHER THAN  
AVAILABILITY AGAINST SIGHT DRAFTS ON NEW YORK BANK=

FIRST NATIONAL BANK IN DALLAS.

.9 4 28861 1===\$17,500.00, 246 PM.. CLR..

✓A  
4-10-47  
245

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE



# FIRST NATIONAL BANK

IN DALLAS

CAPITAL \$7,500,000.00 SURPLUS \$7,500,000.00

UNDIVIDED PROFITS \$5,000,000.00

DALLAS 1, TEXAS

April 10, 1947

FILED

APR 29 1947

CHARLES E. STEWART, Clerk

FOREIGN DEPARTMENT

CABLE ADDRESS: FIRST BANK

WILBUR H. ROBERTS  
ASST. VICE-PRESIDENT

Air Mail

Mr. J. T. Kingsley, President  
Domestic and Foreign Commerce Corp.  
Mills Building  
Washington 6, D. C.

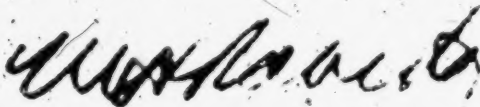
Dear Mr. Kingsley:

In accordance with the request contained in your telegram of the 9th, we have been pleased to wire you today as follows:

^ "RETEL 9TH CORN EXCHANGE WIRE 4TH RECEIVED ADVISING  
OPENING CREDIT 28861 \$17,500.00 BUT ACTUAL CREDIT  
NOT YET RECEIVED AND WAR ASSETS AWAITING ITS ARRIVAL.  
THEY EXPRESS PREFERENCE FOR FUNDS TO BE PLACED HERE  
FOR PAYMENT INVOICES RATHER THAN AVAILABILITY AGAINST  
SIGHT DRAFT ON NEW YORK BANK."

We have discussed this matter with the War Assets Administration and, as stated in our wire, they prefer that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn under a letter of credit to be paid in New York. Of course if it is the desire of the Corn Exchange Bank and Trust Company, New York City, that we pay the drafts here without this bank assuming any responsibility whatsoever, we shall be pleased to render the usual service but we do not care to assume any responsibility for the payment of the drafts in New York City.

Very truly yours,



Asst. Vice President

..HR:mg

cc: War Assets Administration



FILED APR 29 1947

CHARLES E. STEWART, Clerk

**Corn Exchange Bank Trust Company**STRAIGHT IRREVOCABLE LETTER OF CREDIT N<sup>o</sup>. N/Y 28861

\$ 17,500.-

New York April 4, 1947

Domestic and Foreign Commerce Corporation  
 Mills Building or War Assets Administration  
 Washington 6, D.C.

Gentlemen:

*We hereby authorize you to cash on this company*  
*for account of* Penn Pocahontas Company Inc.  
 New York City

*up to an aggregate amount of* Seventeen thousand five hundred  
*U.S. Dollars*

*available by your drafts at sight for full invoice cost of*  
 10,000 net tons of 2,000 lbs. each, of Oklahoma Stove Size  
 Bituminous Coal from storage at \$1.75 per net ton loaded on  
 Railroad cars at Camp Maxie, Texas. The following documents are to  
 be attached to the drafts: Original Invoice and three copies,  
 Original Railroad Bills of Lading substantiating invoice weights  
 made to the order of Penn Pocahontas Company Inc. dated latest May  
 31st, 1947 evidencing shipment from Camp Maxie, Texas and consigned  
 according to instructions contained in letter to be written and  
 addressed to Domestic and Foreign Commerce Corporation by Penn  
 Pocahontas Company Inc., (original and duplicate copy of letter  
 required) specifying car loading date and tidewater consignment  
 of loaded cars.

Note: This Credit has been advised by wire through the First  
 National Bank of Dallas, Dallas, Texas, with instructions to notify  
 the beneficiary. Bankers should negotiate drafts only against the  
 advice of that bank to beneficiary, this letter being simply a  
 confirmation of draft drawn under this credit which shall state that it is

*drawn under Letter of Credit N<sup>o</sup>. N/Y 28861 dated New York*  
*April 4 1947 and must be advised to this company*

*We hereby agree with the beneficiary that all drafts*  
*issued by virtue of this Credit and in accordance with the*  
*above stipulated terms shall meet with due honor upon*  
*presentation at our office in New York City if drawn and*  
*presented at our office*

June 7, 1947

Yours respectfully,

*Corn Exchange Bank Trust Company*  
*Stewart* *Stewart*  
 AUTHORIZED SIGNATURE VICE-PRESIDENT



EXHIBIT N

LETTER  
OF AMENDMENT

# Corn Exchange Bank Trust Company

13 WILLIAM STREET

FOREIGN DEPARTMENT

CABLE ADDRESS  
CORNEXBANK, NEW YORK

NEW YORK 13, N. Y.

RE: LETTER OF CREDIT NO. 28861

April 14, 1947

ACCOUNT Penn Pocahontas Company Inc.

THE ABOVE LETTER OF CREDIT OPENED IN YOUR FAVOR IS AMENDED IN THAT drafts and documents may be negotiated at the office of the First National Bank of Dallas, Dallas, Texas not later than June 7th, 1947.

FILED

APR 29 1947

CHARLES E. STEWART, Clerk

ALL OTHER CONDITIONS REMAIN UNCHANGED

To Domestic and Foreign Commerce Corp.  
Mills Building or War Assets  
Administration  
Washington 6, D.D.

VICE PRESIDENT

AUTHORIZED SIGNATURE

26



First National Bank in Dallas  
DALLAS, TEXAS

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

April 16, 1947

*Original Ltr  
to it presented  
with documents  
when they must  
begin to move*

War Assets Administration  
P. O. Box 6030  
Dallas, Texas

Re: Corn Exchange Bank Trust Co., New  
York Letter of Credit No. 28861.

Attention: Mr. Hudspeth

Gentlemen:

In accordance with our telephone conversation of this date, we are pleased to quote a telegram received from the Corn Exchange Bank Trust Company, New York, N. Y., which reads as follows:

"NOTIFY DOMESTIC AND FOREIGN COMMERCE CORPORATION MILLS BUILDING WASHINGTON 6 DC OR WAR ASSETS ADMINISTRATION CREDIT 28861 WIRTD APRIL FOURTH AMENDED DRAFTS AND DOCUMENTS MAY BE NEGOTIATED AT YOUR OFFICE NOT LATER THAN JUNE SEVENTH NINETEEN HUNDRED FORTY SEVEN INSTEAD OF PRESENTATION AT OUR OFFICE OTHER CONDITIONS UNCHANGED."

It now appears that we have the necessary authority to pay drawings against the above mentioned letter of credit when presented to our office accompanied by the required documents and the original letter of credit.

Very truly yours,

*J. A. H. Smith*  
Asst. Vice President

HAL:mg



FILED APR 29 1947

CHARLES E. STEWART, Clerk

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WEST  
UNION

A. N. WILLIAMS  
PRESIDENT

EXHIBIT P

NL = Night Letter

LC = Deferred Cable

NLT = Cable Night Letter

Ship Radiogram

The filing time shown in the date line of telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

DA 08

D.LC754 GOVT PD=WUX DALLAS TEX 16 653P

DOMESTIC FOREIGN & COMMERCE CORP, ATTN MR KINGSLEY=

209 MILLS BLDG WASHDC=

RE SALE 10,000 TONS COAL AT \$1.75 TON OUR CREDIT DIVISION  
HAS BEEN NOTIFIED BY FIRST NATIONAL BANK, DALLAS, IT DOES  
NOT HAVE SUFFICIENT AUTHORITY TO PAY FOR THIS MATERIAL  
UPON PRESENTATION OF INVOICES. THIS IF FORMAL NOTIFICATION  
SALE IS CANCELLED. END/RDL/DSS-7/LERER=

FRANK M GRAY WAA.

10,000 \$1.75 END/RDL/DSS-7/LERER.

3 PATRONS CONCERNING ITS SERVICE



FILED APR 29 1947 CHARLES E. STEWART, Clerk

BY DIRECT

EXHIBIT Q.

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN  
UNION

A. N. WILLIAMS  
PRESIDENT

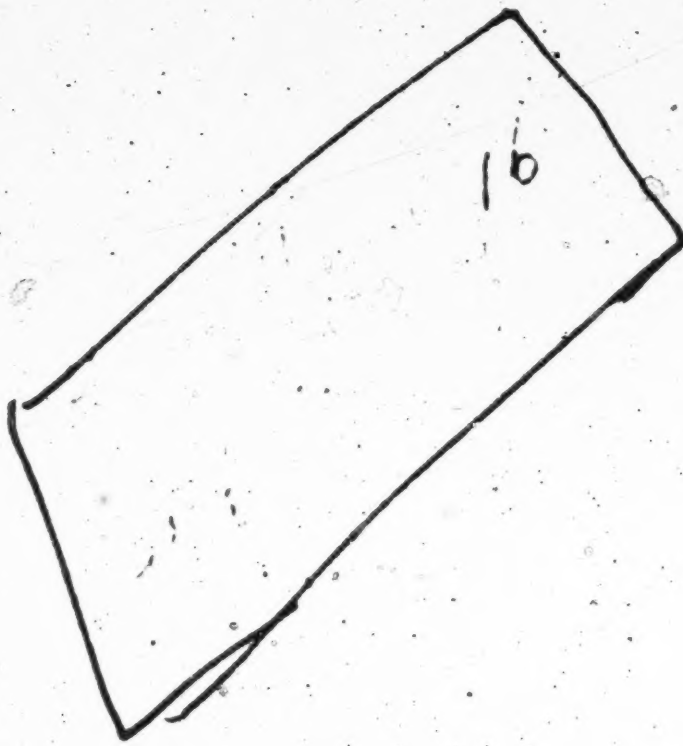
DL = Day Letter
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Ship Radiogram

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GA WU T EL1 DL CHG DOMESTIC AND FOREIGN COMMERCE  
CORPORATION, APRIL 17, 1947, =

PERSONAL

MR. HARRY HOLLIDAY,  
REGIONAL DIRECTOR,  
WAR ASSETS ADMINISTRATION,  
DALLAS, TEXAS =



WE HAVE WIRE FROM YOUR MR. GRAY INDICATING THAT FIRST NATIONAL BANK DOES NOT HAVE SUFFICIENT AUTHORITY TO PAY MONIES AGAINST PRESENTATION OF INVOICES SUPPORTED BY RAILROAD BILLS OF LADING COVERING OUR PURCHASE OF COAL NOW AT CAMP MAXEY. THIS COAL HAS BEEN SOLD TO FOREIGN GOVERNMENT AND PORT ARRANGEMENTS HAVE BEEN COMPLETED FOR THE LOADING AND THE FIRST NATIONAL BANK OF DALLAS HAS IRREVOCABLE LETTER OF CREDIT FROM THE CORN EXCHANGE BANK, NEW YORK CITY WITH FULL AUTHORITY TO MEET YOUR INVOICES TOTALING APPROXIMATELY \$17,500.00. WE DO NOT UNDERSTAND THIS ACTION AS BONAFIDE LETTER OF CREDIT IS ESTABLISHED AND IS USUAL COMMERCIAL PROCEDURE. WE WILL APPRECIATE YOUR IMMEDIATE ANSWER AND THIS IS TO FORMALLY PROTEST CANCELLATION AS INDICATED IN YOUR

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
J.T.KINGSLEY, PRESIDENT

\$17,500.00.....

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE



FILED APR 29 1947 CHARLES E. STEWART, Clerk

EXHIBIT R

GA WUT ELI DL CHG DOMESTIC AND FOREIGN COMMERCE  
CORPORATION, APRIL 18, 1947  
WAR ASSETS ADMINISTRATION,  
WUX, DALLAS, TEXAS

WITH FURTHER REFERENCE OUR PURCHASE OF TEN THOUSAND TONS  
SURPLUS COALS STORED CAMP MAXEY TEXAS AND YOUR ACKNOWLEDGE  
MENT DATED MARCH NINETEENTH. WE HAVE COMPLIED WITH EVERY  
REQUIREMENT UNDER THIS PURCHASE CONTRACT PLUS YOUR DESIRE  
THAT LETTER OF CREDIT BE AMENDED TO PERMIT PAYMENT AT FIRST  
NATIONAL BANK IN DALLAS, DALLAS, TEXAS AND THIS IS FORMAL  
NOTIFICATION WE REGARD CONTRACT STILL IN EFFECT. WE EXPECT  
TO ISSUE SHIPPING INSTRUCTIONS VERY SHORTLY. THIS MATTER HAS  
BEEN TAKEN UP WITH GENERAL MOLLISON REGARDING THIS PURPORTED  
CANCELLATION.

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
J.T.KINGSLEY, PRESIDENT



Filed Apr 29 1947

**Affidavit of Joseph T. Kingsley**

Joseph T. Kingsley being first duly sworn, deposes and says:

I am president of the Domestic and Foreign Commerce Corporation, plaintiff in the above entitled case, and have personal knowledge of the facts hereinafter stated:

The Domestic and Foreign Commerce Corporation has purchased, by a contract effective March 19, 1947, 10,000 tons of War Assets Administration surplus bituminous coal, located at Camp Maxey, Texas, and described as follows:

"Stove size, mined near Henryetta, Oklahoma; mining company, moisture content, volatile matter, fixed carbon percent, ash percent, B. T. U.'s per pound and ash fusion temperature are unknown. Stored outside on ground in three windrows, for approximately three years, adjacent to a switch track of Frisco line.

"This coal is offered FOB cars, Camp Maxey, north of Paris, Texas."

War Assets Administration Regional Office at Dallas has purported to cancel this contract and to re-sell the coal to another purchaser.

Plaintiff is engaged in the export of War Assets Administration surplus coal. Plaintiff has already purchased, paid for, and exported in excess of 100,000 tons of coal under previous contracts with War Assets Administration, of which this is an extension.

Plaintiff has entered into a contract selling the coal to the Penn Pocahontas Coal Company of New York.

Plaintiff has a guaranteed gross profit of \$1.00 per ton under this contract and a share in any profit over one additional dollar a ton made by the Penn Pocahontas Coal Company.

Plaintiff has fully complied with all of the requirements of its contract with the War Assets Administration and has



had established an irrevocable letter of credit at the First National Bank in Dallas in the amount of \$17,500.00, which will pay the full purchase price of the coal when the defendant presents sight draft, with bills of lading and railroad scale weights attached, to that bank.

Plaintiff is informed by the Penn Pocahontas Coal Company that they have resold the coal involved to the Portuguese government at a price of \$8.50 to \$9.00 per ton FOB Texas ports, the exact price depending upon the port used.

Plaintiff has had special railroad rates established for the movement of this coal at a cost of \$2.06 per ton from Camp Maxey to various Texas ports.

Plaintiff has been informed by the War Assets Administration Regional Office, by telegram dated April 16, 1947, that the sale of the coal to it is cancelled. If

37 this cancellation is allowed to stand, plaintiff will lose a valuable standing it has established in the coal export trade, its business will suffer, and plaintiff may become liable to claims by the Penn Pocahontas Coal Company under its contract, and by the Portuguese government.

Affiant alleges that, as stated in the complaint, the War Assets Administration has purported to cancel the sale and that if this cancellation remains in effect, plaintiff will be immediately and irreparably damaged to the extent of \$3.00 per ton of coal involved in addition to the liability which plaintiff may incur for failure to make delivery to the Penn Pocahontas Coal Company.

1 Joseph T. Kingsley

JOSEPH T. KINGSLEY

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this twenty-ninth day of April, 1947.

2 EVA C. RUFF

Notary Public, D. C.

My Comm. Expires 2-28-'51.



31

Filed Apr 29 1947

**Temporary Restraining Order**

Whereas, in the above entitled cause, it has been made to appear by the verified complaint herein and by the affidavit of Joseph T. Kingsley sworn to April 29, 1947, that there is danger of immediate and irreparable injury, loss or damage of a large but unascertainable measure being caused to the plaintiff before notice can be served for the reason that such injuries are liable to occur before hearing upon notice can be had, because the defendant, War Assets Administration, has entered into a purported contract of sale of plaintiff's coal to the Midland Coal Company, and may at any time begin making delivery of the coal, and if such delivery is made the plaintiff will be illegally deprived of coal owned by it and will be irreparably injured in its business.

Now Therefore, on motion of the plaintiff it is ordered that you, the defendant herein, your agents, deputies and employees, are hereby temporarily restrained and enjoined from:

32 (a) Delivering any of said coal located at Camp Maxey, Texas, to Midland Coal Company or to any other person;

(b) Taking any other action with respect to the use or disposition of this coal except delivering the same to the plaintiff under the terms of its contract.

And you, the defendant, are hereby directed to instruct by telegraph the Regional Office of the War Assets Administration at Dallas, and your employees there, not to make delivery of this coal to anyone or any other disposition thereof, pending further notice from you and the further order of this Court.

This temporary restraint is on condition that a bond be filed by plaintiff herein the sum of \$1,000.00 for the payment of such costs and damages as may be incurred by defendant.



This restraining order will remain in force only until the hearing and determination of the application for a preliminary injunction herein, and shall expire within ten days after entry, unless within said time it is extended for like period with good cause shown, or unless defendant herein consents that it may be extended for a longer period. The matter of the issuance of a preliminary injunction is hereby set down for hearing on the sixth day of May, 1947, at ten o'clock, in the forenoon of said day; or as soon thereafter as counsel can be heard.

This order issued at Washington, D. C., this 29th day of April, 1947, at 3:22 o'clock, P. M.

(Signed) JAMES M. PROCTOR  
*Justice*

40

Filed May 6 1947

### **Motion to Dismiss**

Now comes the defendant, Robert M. Littlejohn, as War Assets Administrator and Surplus Property Administrator, by Peyton Ford, Acting Assistant Attorney General, and George Morris Kay, United States Attorney, and moves the court to dismiss the complaint herein on the grounds that

1. The Court lacks jurisdiction over the subject matter of the suit in that the suit is in reality against the United States for specific performance of a contract to sell coal, and the United States has not consented to be sued.

2. The complaint does not state a claim upon which relief may be granted, because (a) it affirmatively appears from the complaint that plaintiff has not performed all the conditions on its part to be performed, in compliance with the terms of the government's offer to sell; (b) title to the coal in question would not pass until delivery to the carrier, and the complaint does not allege that the coal was ever so delivered; (c) any damages sustained by the plaintiff

resulting from alleged breach of contract would be readily ascertainable in an action at law, and (d) plaintiff has an adequate remedy at law and would not suffer irreparable injury, and hence relief is barred by Section 267 of the Judicial Code, 28 U. S. C. 384.

41. In support of this motion, the Court is respectfully referred to the affidavit of Walter M. Day, verified May 5, 1947, attached hereto.

Peyton Ford

PEYTON FORD

*Acting Assistant Attorney General*

George Morris Fay

GEORGE MORRIS FAY

*United States Attorney*

*Attorneys for defendant*

*Robert M. Littlejohn*

Service is hereby acknowledged May 6, 1947, 9:55 A. M.

STEPHEN J. McMAHON, JR.

42 Filed May 6 1947

**Affidavit**

DISTRICT OF COLUMBIA

*City of Washington, ss.*

Walter M. Day, being duly sworn, deposes and says:

That I reside in the City of Washington, District of Columbia, and am in the employ of War Assets Administration, Washington, D. C., in the capacity of Director, Credit Division, and, as such, have charge of the passing upon and extension of credit on behalf of War Assets Administration in the sale of surplus property.

That, on April 7, 1947, Mr. J. T. Kingsley, President and Treasurer of Domestic and Foreign Commerce Corporation, Washington, D. C. (hereinafter referred to as "Do-



mestic"); accompanied by his attorney, Mr. T. Peter Ansberry, called on me regarding difficulties Domestic was having with respect to an offer to purchase coal from the War Assets Administration Regional Office at Grand Prairie, Texas. Kingsley stated that to pay for the coal, the total cost of which was \$17,500, \$5,000 had been deposited with the First National Bank of Dallas for the sole purpose of making payment. Payment was to be made by the First National Bank of Dallas on presentation of railroad bills of lading, government invoices and weight certificates. He further stated that an additional \$12,500, in the form of a bank letter of credit, was available for the same purpose. Kingsley did not have a copy of the letter of credit with him nor was he able to furnish information regarding its terms. At no time since then has the letter of credit or a copy thereof been presented to War Assets Administration for inspection. Kingsley and Ansberry called on me a number of times after April 7, the last being on April 21, at which time they left a memorandum purporting to be a history of the transaction.

That, pursuant to my request, the War Assets Administration Regional Office at Dallas, Texas, forwarded to me copies of all letters and telegrams in connection with the proposed sale to plaintiff. That the statements made by me in this affidavit in connection with the negotiations at the Dallas Office are upon information and belief; that the sources of information and the grounds for my belief are based upon the file of correspondence received from the Dallas Office.

That War Assets Administration officials are not permitted to extend credit to commercial buyers unless complete information on the financial standing of the prospective debtor is furnished by the prospective debtor.

That it is the policy of War Assets Administration to retain title to property, subject of a contract of sale, until the property has been turned over to a common carrier, at which time invoices are presented to the purchaser for pay-

ment, so that at no time is credit extended unless arrangements therefor have been made in advance.

44. These facts are clearly stated in the Standard Terms and Conditions in the memorandum of sale with the plaintiff, which stated in part as follows:

"Unless credit has been established, payment must be made . . . prior to shipment of the property or its removal by purchaser.

"Specific shipping instructions from the purchaser must be received by the Regional Office of Seller responsible for the sale within ten (10) days from the date of Seller's instructions to Purchaser to make remittance and to furnish shipping instructions.

"If the property is lost, damaged or destroyed otherwise than by the fault or negligence of Purchaser prior to shipment during the applicable period prescribed . . . above for . . . issuance of shipping instructions, Seller's liability shall be limited . . .

"If Purchaser fails to issue shipping instructions within the applicable period . . . , the risk of loss . . . shall be upon the Purchaser."

In this case Domestic has stipulated five methods of payment, only one of which was accepted by War Assets Administration. On March 13, 1947 Domestic requested that 10,000 tons of coal be allotted to it and stated that:

"Contract shall be on cash basis based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank in Dallas."

This arrangement for payment was and is interpreted by War Assets Administration as follows: Coal, at an agreed upon price per ton, the weight to be established by the railroad, would be paid for by a Dallas bank on presentation of invoices; that funds to pay had been or would be deposited by Domestic with the Dallas bank or that arrangements for



credit by such bank had been or would be arranged by Domestic.

The manner of payment was sought to be modified and varied by Domestic on March 28, 1947, as follows: Cash payment on presentation of railroad scale weight tickets showing gross, tare, and net weights attached to the original bills of lading when presented to the First National Bank of Dallas. It was requested that the original bills of lading be presented to the bank with invoices and that duplicate bills of lading be sent to Domestic's agent at a Gulf port to be specified.

The letter advising War Assets Administration of the proposed change in the method of payment also stated that on noon that day, March 28, 1947, the Bank of Manhattan had, on orders of Penn-DuPont Coal Company, deposited \$5,000 with the First National Bank of Dallas. In another letter dated the same day Domestic stated that immediately the coal began to move the fund would be supplemented by an additional \$12,500.

This change in the method of payment was not accepted by War Assets Administration and, on April 1, 1947, Domestic was advised that unless "\$17,500 is deposited First National Bank, Dallas, for payment of total quantity this coal by noon 4/4/47 sale will be cancelled and other disposition made". On April 4, 1947 Domestic was advised that unless \$17,500 was deposited with War Assets Administration or the First National Bank of Dallas the sale would be cancelled ten days from that date. Thus the method of payment originally proposed by Domestic on March 13, 1947 and accepted by War Assets Administration and that proposed on March 28, 1947 differ radically. An irrevocable deposit of \$17,500 to be paid to War Assets Administration on presentation of bills of lading, weight certificates and invoices differs materially from a deposit of \$5,000 to be paid to War Assets Administration on presentation of bills of lading, weight certificates and invoices, particularly when the deposit was made by a person other

than Domestic and it can be assumed under definite restrictions to protect the interests of the depositor, Penn-Pocahontas Coal Company. Therefore, War Assets Administration was justified in advising Domestic that failure to deposit by a specified time the full amount, \$17,500, would result in cancellation.

46 In response to War Assets Administration's wire of April 1, Domestic on April 4, 1947 wired that it had placed with the First National Bank of Dallas a letter of credit for the balance of \$12,500. This was never done.

On April 7, 1947 War Assets Administration was advised by the First National Bank of Dallas that it had, on April 4, 1947, received telegraphic advice from the Corn Exchange Bank Trust Company, New York, of the opening of an irrevocable straight letter of credit in favor of Domestic and War Assets Administration in the amount of \$17,500 for the account of Penn-Pocahontas Coal Company. The advice stated that payment would be made by the Corn Exchange Bank Trust Company on receipt of sight drafts on them, accompanied by:

1. Original invoices and three copies covering 10,000 net tons (of 2,000 lbs. each) of Oklahoma stove-size, bituminous coal from storage, at \$1.75 per net ton loaded.

2. Original railroad bills of lading substantiating invoice weights made to order of Penn-Pocahontas Company, Inc. dated latest May 31, 1947, evidencing shipment and consigned according to instructions contained in letter to be written and addressed to Domestic by Penn-Pocahontas.

3. Original and duplicate of letter of Penn-Pocahontas to Domestic specifying car-loading date and tide-water consignment of loaded cars.

The telegraphic advice stated that the drafts must be presented not later than June 7, 1947. The advice of opening was telegraphic and the actual letter of credit was not received by the Dallas bank or War Assets Administration any time prior to cancellation.



The letter of credit referred to in the wire from the Corn Exchange Bank Trust Company to the Dallas Bank as quoted in the letter of the Dallas Bank to War Assets Administration dated April 16, 1947 did not comply with the original proposal of Domestic, or the April 1st or April 4th, 1947 demand of War Assets Administration. Had the War Assets Administration been willing to accept a letter of credit, the one referred to in the aforesaid letter would not have been satisfactory for the following reasons:

1. Shipment in full was required by not later than May 31, 1947 and no shipping instructions had been received. Thus, there could be no assurance of shipment in full by May 31, 1947.

2. The letter, or letters, of Penn-Pocahontas to Domestic had not been received by War Assets Administration—in fact, had never been heard of before. Payment was dependent upon possession of the letter, or letters, in duplicate.

3. The time for presentation, June 7, 1947, did not allow sufficient time for receipt of all bills of lading and weight certificates, preparation of all invoices and sight drafts.

The last objection was sought to be met by Domestic by a further change, in that payment was to be made by the First National Bank, but with the other conditions unchanged. However, a new condition, that the original letter of credit must be presented with the drafts and the original letter or letters from Penn-Pocahontas to Domestic, was imposed. The letter of credit was never presented to War Assets Administration. Therefore, War Assets Administration was not in a position to secure payment and, consequently, the sale was cancelled on April 16, 1947.

To summarize, the proposed sale to Domestic was cancelled by War Assets Administration for the following reasons:

1. Arrangements for payment satisfactory to War Assets Administration were never made. Alternative methods ar-

ranged by Domestic without the prior knowledge of consent of War Assets Administration were unacceptable as there was no assurance of payment except under conditions War Assets Administration was never in a position to fulfill due to the remissness on the part of Domestic in its failure to give shipping instructions.

2. Shipping instructions were never received.

WALTER M. DAY

Subscribed and sworn to before me this 5th day of May, 1947.

JUANITA M. VIDI

*Notary Public, District of Columbia*

My Commission Expires: March 1, 1952.

49

Filed May 6 1947

### **Affidavit**

W. T. Lennon, being duly sworn, deposes and says:

That he resides in the City of Washington, District of Columbia, and is in the employ of the War Assets Administration, as Chief Counsel in charge of Special Projects.

That, pursuant to the temporary restraining order granted by this Court, on the 29th day of April, 1947, deponent caused to be transmitted to the Regional Office of War Assets Administration at Grand Prairie, Texas, a telegram, copy of which is hereto attached and made a part of this affidavit. That the telegram was directed to Grand Prairie, Texas, for the reason that the Office of the Regional Director of that Region had been moved to Grand Prairie from Dallas, Texas, prior to the filing of this action.

That, upon information and belief, no deliveries of the coal involved in the above entitled law suit have been made. That, prior to the service of the summons and complaint and restraining order in the above entitled action upon the defendant herein, and prior to any knowledge that the ac-



tion and restraining order were filed, the War Assets Administration engaged personnel and procured, 50 equipment for the purpose of loading the coal involved in this law suit. That said equipment and personnel were transported to Camp Maxey for the purpose of loading the coal on railroad cars for delivery to Midland Coal Company. That said equipment and personnel, at the present time, are being held at Camp Maxey pending the disposition of the restraining order. That War Assets Administration has been damaged by virtue of the service of the restraining order in that it has been put to considerable expense for transporting equipment and personnel, as aforesaid. The exact amount of the expense is being ascertained by deponent from the Grand Prairie Regional Office.

W. T. LENNON

Subscribed and sworn to before me this 6th day of May, 1947.

MARY M. REPETTI

*Notary Public, District of Columbia*

My Commission expires 12-1-49.

Service is acknowledge subject to objection and objected to May 6, 1947 10:20 A. M.

STEPHEN J. McMAHON, JR.

69 **Hearing Before Honorable Jennings Bailey**  
**Tuesday, May 6, 1947**

Mr. Margoliis: I represent the defendant. We have a motion to dismiss that we served on plaintiff this morning that I would like to file with the Clerk, if I may; and, since there is a motion to dismiss, if the plaintiff has no objection, we think that might very well take priority.

The motion to dismiss goes into the merits—

Mr. Ansberry: If Your Honor please; I do have objection because this was not served on us until court time this morning, at 10 a.m.

The Court: Of course if I find out the complaint does not state a cause of action—

Mr. Ansberry: I agree, but I think that—

The Court: I will hear the motion, but it necessarily involves a question of law, to it.

Mr. Margoliis: May I file these with the Clerk?

Mr. Ansberry: I object to the filing at this time under Rule 7. I will object to the filing of the motion to dismiss at this time in view of Rule 7 of the Rules of the Court.

The Court: What rule?

Mr. Ansberry: Rule 7, if Your Honor please,  
70 which reads that:

“With each motion there shall be filed and served a separate paper stating the specific points of law and authorities to support the motion. Such statement shall be additional to a statement of grounds in the motion itself, and shall be entered on the docket but not be a part of the record. The moving party shall enter the motion and the fact of the filing on a card provided by the clerk. A Statement of opposing points and authorities shall be similarly filed, noted and served within five days or such further time as the court may grant or the parties agree upon. If not filed within the time prescribed the court may treat the motion as conceded.”

We feel, although we don't insist on the point, we feel that the motion has been conceded by a failure to file an opposition within the proper time.

The Court: I will allow the motion to be filed, but not hear it this morning.

Mr. Margoliis: May I point out one thing?

We filed a motion to dismiss. We also filed points and authorities in support of a motion to dismiss, as well as in opposition to the application for a preliminary injunction.

Certainly our points and authorities are specific in their opposition.



The Court: I will be glad to consider your points and authorities, because they really go to the effect of this motion.

Mr. Margolius: Thank you.

The Court: Very well.

Mr. Ansberry: If Your Honor please, we have had no opportunity to examine them.

The Court: That may be, but I am here to pass on your motion, and if they can convince me in any way that the motion should be allowed,—I will hear it, unless you want to postpone the hearing for this injunction until you have had an opportunity to examine it.

Mr. Ansberry: If Your Honor would.

Mr. Margolius: There is a bond of \$10,000 and the government has 10,000 tons of coal which would be tied up, it is highly inflammable, and the equipment.

The Court: You have a right to file points and authorities in opposition to this motion. You have not done so.

Mr. Margolius: There was no motion in this Court.

The Court: It may go over until Friday.

Mr. Margolius: Will the motion to dismiss be heard on Friday?

The Court: I think they should both be heard on Friday, yes.

That is, if the Court has an opportunity to hear it on Friday. Friday is a very busy day in Motions Court.

Mr. Margolius: Will it be heard by Your Honor on Friday?

The Court: I don't know. I am going into Motions Court for the next two days because Judge Proctor, I forget what he said it was about,—he said he might be back on Friday, I don't know. If he is not back Friday, I will be in Motions Court on Friday.

Mr. Ansberry: Thank you, Your Honor.

The Court: If you gentlemen would care to argue this this morning,—I have the rest of the day free—

Mr. Margolius: The government is ready.

Mr. Ansberry: We have had no time to examine—

The Court: I am willing to hear the motion for injunction, but I will consider any authorities—

Mr. Margolius: We received five days,—but nevertheless we were able to be ready this morning; and since the case is really made out by the complaint, we are somewhat surprised that the plaintiff feels itself unable to proceed.

The Court: I am perfectly willing to hear a motion for injunction.

Mr. Ansberry: We are—

Mr. McMahon:—for the—

The Court: I can't hear you both at once.

Mr. Ansberry: Pardon. I was saying, If Your Honor please, that we are prepared on the points raised in our motion for preliminary injunction. We are not prepared on the points and authorities, nor on the affidavit of the government, which raises new matters,—of fact.

Mr. Margolius: We would be prepared—

The Court: The affidavit will be considered on a motion—

Mr. Ansberry: Pardon?

The Court: The affidavit would be considered on a motion for injunction.

Mr. Ansberry: But we would have had sometime, normally, to examine it, prior to coming into court.

I would like to have an opportunity to at least read the government's papers, which comprise 30-odd pages in all.

The Court: Have you filed points and authorities in support of your motion?

Mr. Ansberry: Yes, Your Honor.

Mr. Margolius: We might very well argue whether an injunction should continue from now until Friday.

The Court: Very well. I will hear the application for injunction, now.

Mr. McMahon: This hearing is an application for an injunction on the cross pleadings of the plaintiff, as of this morning,—is that correct?



The Court: I am hearing the motion which has been filed.

Do you have that card, Mr. Belew?

(The Clerk passed a paperwriting to the Court.)

The Court: A motion for a preliminary injunction is what I am going to hear.

There had been a temporary restraining order granted?

Mr. McMahon: Yes, Your Honor.

Mr. Margolius: I resent—I beg your pardon.

The Court: On April 29th, there was a motion for a preliminary injunction filed, and that is the one I will hear now.

Mr. Ansberry: Thank you, Your Honor.

Mr. McMahon: That answers my question.

102      **Hearing Before Honorable Jennings Bailey**  
**May 7, 1947**

The Court: I am satisfied that this suit is in effect a suit for specific performance and the United States is a necessary party, and this Court is without jurisdiction.

The temporary restraining order will be dissolved and the application for a preliminary injunction denied.

Mr. Ansberry: If Your Honor please, the plaintiff will seek to appeal and I will ask Your Honor to indicate the amount of the bond.

The Court: The usual bond is \$250.00, but if you want to get a stay order from the Court of Appeals, I think you had better let me pass on the motion to dismiss, because I think this opinion so far decides that question.

So the motion to dismiss will be sustained, and if you want to apply immediately to the Court of Appeals for a stay order, I will not sign the order—I don't think you can appeal until I have signed the order.

Mr. Ansberry: Does Your Honor wish to make conclusions of law on the point?

The Court: I have already stated what my conclusions of law are:

Mr. Ansherry: Does Your Honor find that title was not in the Domestic and Foreign Commerce Corporation?

The Court: That is my view, that the title is not in the plaintiffs. I think it is simply a suit for specific performance.

Mr. McMahon: Your Honor finds it was a suit for specific performance?

The Court: What is that?

Mr. McMahon: Your Honor finds it was a suit for specific performance, complainant's petition, complaint, rather, was a complaint for specific performance?

The Court: That is my view of it, what it amounts to, yes.

Mrs. Ansherry: Does your Honor find the contract sale, or contract to—

The Court: I am not passing on that. I now sustain the motion to dismiss. I suggest that the matter remain in status quo, this is Wednesday, until Friday. You can apply to the Court of Appeals here for a stay order.

My view is the suit is to be dismissed.

### CERTIFICATE

I, Luceda H. Powell, an official reporter for the District Court of the United States for the District of Columbia, certify that the foregoing is the official transcript of the proceeding had in this case.

LUCEDA H. POWELL

Filed May 9 1947

### Order, Judgment, and Decree

This cause having come on for hearing May 6, 1947, pursuant to an order contained in temporary restraining order issued April 29, 1947, on plaintiff's complaint and motion



for preliminary injunction, together with affidavit and memorandum of points and authorities in support thereof; and plaintiff's counsel having been heard thereon at said hearing May 6, 1947; and defendant having filed a motion to dismiss plaintiff's complaint immediately prior to the hearing on May 6, 1947, supported by affidavits and points and authorities filed concurrently therewith, which were both in support of the motion to dismiss and in opposition to the motion for preliminary injunction; and the court thereupon being of the opinion that the complaint did not state a cause of action; it is hereby

Ordered, Adjudged, and Decreed That:

1. Plaintiff's motion for preliminary injunction be, and it is hereby, denied.
2. Defendant's motion to dismiss the complaint be, and it is hereby, granted.
3. The complaint be, and it is hereby, dismissed with prejudice.

Plaintiff having prayed an appeal in open court, it is ordered that upon plaintiff's giving a cost bond for Two Hundred Fifty (\$250.00) Dollars and One Thousand (\$1,000.00) Dollars injunction bond which may be continued on the consent of the surety in the original injunction bond, a temporary restraining order issue upon the same terms as that heretofore issued in this cause, which shall expire in ten (10) days from the issuance of this order.

(s) JENNINGS BAILEY

*Justice*

May 9, 1947

Approved as to form

(s) PETER ANSBERRY

*Attorney for plaintiff*

(s) PEYTON FORD,

*Assistant Attorney General*

By HUBERT H. MARGOLIES

*Attorney for Defendant*

IN THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA

Docket No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, MILLS BUILD-  
ING, WASHINGTON, D. C., APPELLANT

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SUR-  
PLUS PROPERTY ADMINISTRATOR, RAILROAD RETIREMENT BUILD-  
ING, WASHINGTON, D. C., APPELLEE

United States Court of Appeals for the District of Columbia.  
Filed May 16, 1947. Joseph W. Stewart, Clerk.

*Motion to advance hearing and to grant leave for mimeographed  
briefs*

Whereas, this is an emergent matter requiring the preserva-  
tion of status quo by injunction pending appeal, and for other  
reasons more fully referred to in the accompanying motions and  
memorandum.

Now, therefore, comes appellant and respectfully petitions and  
moves the court as follows:

1. To advance this cause for hearing on its calendar to Mon-  
day, May 26, 1947, at 11 o'clock in the morning as soon there-  
after as counsel can be heard.

2. To grant leave for counsel to file mimeographed briefs.

Dated May 16, 1947.

(S) T. Peter Ansberry,

T. PETER ANSBERRY,

*Attorney for Appellant.*

(S) STEPHEN J. McMAHON, Jr.,

*Of Counsel.*

Service of motion acknowledged 16 May 1947.

(S) PEYTON FORD,

*Acting Asst. Atty. General.*

(S) GEORGE MORRIS FAY,

*U. S. Attorney.*

(S) EDWARD H. HICKEY,

*Atty. for Def.*



320  
In the United States Court of Appeals for the District of  
Columbia

Docket No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, MILLS BUILD-  
ING, WASHINGTON, D. C., APPELLANT

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SUR-  
PLUS PROPERTY ADMINISTRATOR, RAILROAD RETIREMENT BUILD-  
ING, WASHINGTON, D. C. APPELLEE

*Motion for leave to file counter affidavit*

Whereas, it appears in the record that an affidavit was filed  
by appellee immediately before the hearing in the court below on  
this cause and appellant had no opportunity to file a counter  
affidavit showing that said affidavit tended to mislead, as it only  
partially stated the facts which it purported to cover.

Now, therefore, comes the appellant and respectfully petitions  
and moves the court for leave to file the attached counter  
affidavit.

(S) T. Peter Ansberry,  
T. PETER ANSBERRY,

*Attorney for Appellant.*

(S) STEPHEN J. McMAHON, Jr.,  
*Of Counsel.*

Service of motion acknowledged 16 May 1947.

(S) PEYTON FORD,  
*Acting Asst. Atty. General.*

(S) GEORGE MORRIS FAY,  
*U. S. Attorney.*

(S) EDWARD H. HICKEY,  
*Atty. for Def.*

In the District Court of the United States for the District of  
Columbia

Civil Action No. 1803-47

DOMESTIC AND FOREIGN COMMERCE CORPORATION, MILLS BUILDING,  
WASHINGTON, D. C., PLAINTIFF

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SUR-  
PLUS PROPERTY ADMINISTRATOR, RAILROAD RETIREMENT BUILDING,  
WASHINGTON, D. C., DEFENDANT

*Counter affidavit*

Joseph T. Kingsley, being duly sworn, deposes and says that the statements of Mr. W. T. Lennon in his affidavit:

"That, prior to the service of the summons and complaint and restraining order in the above entitled action upon the defendant herein, and prior to any knowledge that the action and restraining order were filed, the War Assets Administration engaged personnel and procured equipment for the purpose of loading the coal involved in this law suit. That said equipment and personnel were transported to Camp Maxey for the purpose of loading the coal on railroad cars for delivery to Midland Coal Company,"

are incomplete and tend to mislead the Court, in that they do not fairly cover the subject purported to be covered.

That he has communicated with Mr. C. R. Malone at the Headquarters at Camp Maxey, Texas, by telephone on May 6, 1947. Mr. Malone informed him that two drag lines have been sent to Camp Maxey to handle the loading of this coal, one arriving on April 29th and the other arriving on May 1st, and that no railroad cars have arrived at Camp Maxey for the loading of this coal. That an operator for each dragline are the only personnel which have arrived for the loading.

Deponent says further that on April 18, 1947, he, in company with Mr. Ansberry, conferred with Mr. Larson, Chief Counsel, War Assets Administration, at Mr. Larson's office in the late afternoon, and that he and Mr. Ansberry at that time informed Mr. Larson that if efforts were made to deliver the coal to the Midland Coal Company an injunction proceeding would be filed.

That he and Mr. Ansberry discussed fully with Mr. Larson the documents comprising the contract and the arrangements for payment and the later communications with the Dallas office of the War Assets Administration up to that date. That Mr. Larson then dictated a teletype to the Dallas Regional Office, in the presence of the deponent and Mr. Ansberry which stated, among other things, that Mr. Larson felt that the Domestic and Foreign Commerce Corporation appeared to be acting in good faith and was endeavoring to carry out the contract, and that he, Mr. Larson, wished the file of the Dallas Regional Office to be sent to him for review. On information and belief, that this teletype was duly and promptly forwarded.

That on the same afternoon the deponent and Mr. Ansberry conferred with General Mollison, deputy administrator of War Assets Administration, and that General Mollison also assured them that no action would be taken until the file had been reviewed by the Washington office.

That nothing was heard from Mr. Larson, nor from General Mollison by either the deponent or by Mr. Ansberry on either the 21st, the 22nd, or the 23rd of April, and that although both the



deponent and Mr. Ansberry made repeated efforts to reach both Mr. Larson and General Mollison on the telephone, that they were unsuccessful in so doing. That nothing was heard from the two telegrams to the Dallas office insisting that the contract was in effect and requesting the reason for the attempted cancellation.

That on the morning of April 24th, nothing having been heard from anyone, Mr. Ansberry placed a telephone call to the War Assets Administration at Dallas from the deponent's office. That the deponent listened to the conversation and also recorded the same, and that in the course of the conversation, Mr. Frank M. Gray, Chief of the Materials and Supplies Division of the Dallas Office, informed Mr. Ansberry the coal had been sold to the Midland Coal Company on April 21st and when the matter of Mr. Larson's teletype was brought up, Mr. Gray said of Mr. Larson: "Well, he don't happen to be running our office down here." That Mr. Ansberry in the course of this conversation repeatedly warned Mr. Gray to take no action with respect to loading the coal or delivering the same, because suit would be filed in District Court for the District of Columbia.

That on information and belief, on April 25, 1947, Mr. McDavitt, Chief Investigator for the House of Representatives Sub Committee on Surplus Property, informed Mr. Larson that suit was being prepared and that Mr. Larson informed Mr. McDavitt that efforts were being made to secure other coal with which to settle.

That therefore, in contra-distinction to the surprise implied by Mr. Lennon's affidavit, the War Assets Administration was at all times aware, from April 18th, and of course from April 21st, when they first purported to sell the coal to the Midland Coal Company, until the present time, that they faced litigation before they could deliver the coal to the Midland Coal Company.

(S.) Joseph T. Kingsley,  
JOSEPH T. KINGSLEY.

Sworn to and subscribed before me this seventh day of May, 1947.

[SEAL]

ROBERT FRIBUSH,  
Notary Public.

My Commission Expires: August 1, 1950.

Tuesday, September 30, 1947

The Court met pursuant to adjournment. Present: Honorable D. Lawrence Groner, Chief Justice, Harold M. Stephens, Henry W. Edgerton, Bennett Champ Clark, Wilbur K. Miller and E. Barrett Prettyman, Associate Justices.

Before Honorable Bennett Champ Clark, Wilbur K. Miller and  
E. Barrett Prettyman, Associate Justices:

No. 9553, April term, 1947

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT,

v.:

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR &C.,  
APPELLEE

Argument commenced by Mr. T. Peter Ansberry, attorney for  
appellant, continued by Mr. Hubert Margolies, attorney for ap-  
pellee, continued by Mr. T. Peter Ansberry for appellant and  
concluded by Mr. Stephen J. McMahon, Jr., Attorney for appellee.

United States Court of Appeals, District of Columbia

No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, APPELLEE

Appeal from the District Court of the United States for the  
District of Columbia

Argued September 30, 1947. Decided December 8, 1947

United States Court of Appeals for the District of Columbia.  
Filed Dec. 8, 1947. Joseph W. Stewart, Clerk.

*Messrs. T. Peter Ansberry and Stephen J. McMahon, Jr., for  
appellant.*

*Mr. Hubert H. Margolies, Attorney, Department of Justice,  
with whom Messrs. Edward H. Hickey, Special Assistant to the  
Attorney General, and George Morris Fay, United States Attor-  
ney, were on the brief, for appellee. Messrs. J. Francis Hayden,  
Special Assistant to the Attorney General, and Sidney S. Sachs,  
Assistant United States Attorney entered appearances for  
appellee.*

Before CLARK, WILBUR K. MILLER, and PRETTYMAN, JJ

CLARK, J.: This action originated with a complaint for an in-  
junction filed by the appellant in the District Court of the United  
States for the District of Columbia on April 29, 1947. Appellee



here was named defendant in the complaint in his capacity as War Assets Administrator and Surplus Property Administrator. A temporary restraining order was issued on that date and the cause came on for hearing May 6, 1947; defendant (appellee here) having filed a motion to dismiss. On May 9, 1947, the lower court decreed that the motion for preliminary injunction be denied and granted the motion to dismiss the complaint. This appeal followed.

The facts giving rise to the complaint, briefly stated, are as follows: Appellant had purchased surplus coal from the War Assets Administration during 1946, and early in March 1947 received from the War Assets Administration an invitation to bid on 10,000 tons of coal which stated, "This coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas." On March 13 appellant answered by telegram, offering to buy the coal as offered and requesting that "this tonnage be allocated to us on same terms and conditions and made a continuing part of our recent contract at same price." A letter from the War Assets Administration to appellant under date of March 19 expressed acceptance of the offer, stating in part, "Also, your terms of placing \$17,500 with the First National Bank, Dallas, Texas, *for payment upon presentation of our invoices to said bank are accepted.*" (Italics supplied.) This letter requested that enclosed standard War Assets Administration forms, one being an offer to purchase and the other being a sales memorandum, be executed and returned, which request was complied with by appellant on March 28. Appellant's letter of transmittal accompanying the forms stated that \$5,000 was being deposited at the Dallas bank that day and that the balance of the funds necessary to meet the invoices would be transferred to the Dallas bank when the shipment began.

War Assets Administration replied by telegram on April 1 informing appellant that the entire amount of \$17,500 should be deposited in the Dallas bank prior to noon on April 4 or the sale would be cancelled. Although appellant arranged for an irrevocable letter of credit payable to War Assets Administration through the Dallas bank within the time specified, and so notified War Assets Administration, there was a further interchange of correspondence and on April 16 War Assets Administration informed appellant by telegram that the sale had been cancelled, holding appellant in default for failing to deposit immediately the full amount of \$17,500 in the Dallas Bank.

Subsequently appellant learned that War Assets Administration had entered negotiations with another party for the sale of the coal involved here and filed the complaint, praying for an injunction against the sale of this coal to any person other than

the plaintiff (appellant) and seeking a decree upon hearing of the cause that the sale to plaintiff is valid and in effect.

The court below, was of the opinion that the complaint did not state a cause of action, after expressing openly the view that the suit was, in effect, one for specific performance involving the United States as an indispensable party, and, therefore, that the court lacked jurisdiction.

We have recently had occasion to scrutinize the doctrine of sovereign immunity as a "jurisdictional" problem,<sup>1</sup> and in doing so we deemed it expedient to adopt the careful analysis which had been made previously by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J. v. Tugwell*, 66 App. D. C. 42, 85 F. 2d 208. For its obvious value in this case we repeat his finding, stated (66 App. D. C. 63; 85 F. 2d 229) that:

"Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether necessary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem, or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. \* \* \* Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdictional \* \* \*' (citing *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties."

The words just quoted have real application here. In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk v. Glenn L. Martin Co.*, 116 F. (2d) 865. The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled.

<sup>1</sup>*Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307 *aff'd*, 330 U. S. 731.



All will concede at the outset that a court has no jurisdiction of a suit against the United States to which the United States has not consented. *United States v. Sherwood*, 312 U. S. 584, 587, 61 Sup. Ct. 767, 85 L. Ed. 1058. That is a ruling doctrine which has long been accepted, as the case cited demonstrates. However, since legal irresponsibility of the Federal Government is derived only by implication from the Constitution, the doctrine has received judicial delimitation which is well established. *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. Therefore, although we may observe that the War Assets Administration functions only as an agency of the United States, it must also be noted that “\* \* \* the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.” *Keifer and Keifer v. R. F. C.*, 306 U. S. 381, 388, 59 Sup. Ct. 516, 83 L. Ed. 784.

Appellant, as complainant below in the suit for injunction, did not seek the court's aid to interfere in the use of official discretion by the appellee. Such discretion was exercised at the time the contract with appellant was entered into. If that contract served to vest title immediately in appellant then it follows that the ruling in *Philadelphia Company v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, is controlling here. That ruling was based on a comprehensive review of the authorities, and we quote the language of Mr. Justice Hughes at pages 619 and 620 (omitting citations):

“If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded \* \* \*. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has been frequently applied with respect to state officers seeking to enforce unconstitutional enactments \* \* \*. And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred.”

Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee. If so, the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief. The use of the word “surplus” in the description of this coal is a word of art which has an important business connotation. Such coal is obtainable only from appellee and has unique value in that it may be exported under special license outside the limitations imposed by the Government under the export allocation system. Appellant had resold this coal, and the re-purchaser had contracted to export the coal to a foreign government. Newly mined

coal obtainable in the open market would not suffice the purpose of the several contracts involving this surplus coal, since it could be exported only in accordance with the export allocation system.

It is our conclusion that the District Court erred in dismissing the complaint in the belief that it lacked jurisdiction. This cause is remanded to the District Court for further proceedings in accordance with this opinion.

*Reversed and remanded.*

United States Court of Appeals for the District of Columbia  
No. 9553. October Term, 1947

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

*vs.*

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR &C.,  
APPELLEE

United States Court of Appeals for the District of Columbia.  
Filed Dec. 8, 1947. Joseph W. Stewart, Clerk.

Appeal from the District Court of the United States for the District of Columbia.

Before CLARK, WILBUR K. MILLER, and PRETTYMAN, J.J.

*Judgment*

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Per Mr. JUSTICE CLARK.

Dated December 8, 1947.

United States Court of Appeals for the District of Columbia  
No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

*v.*

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, APPELLEE

United States Court of Appeals for the District of Columbia.  
Filed Feb. 3, 1948. Joseph W. Stewart, Clerk.



*Designation of record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to appellant's brief, except pp. 51-53 thereof (*i.e.*, the portion beginning with the words "[End of District Court record" on p. 51 and continuing through the end of page 53).
2. Minute entry of argument.
3. Opinion of Court of Appeals.
4. Judgment of Court of Appeals.
5. This designation.
6. Clerk's certificate.

(Sgd.) Philip B. Perlman,  
 PHILIP B. PERLMAN,  
*Solicitor General.*

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 2d day of February, 1948.

(Sgd.) STEPHEN J. McMAHON, Jr.,  
 A. S.  
*Attorney for Appellee.*

In the United States Court of Appeals for the District of Columbia

No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

*v.*

ROBERT H. LITTLEJOHN, AS WAR SURPLUS ADMINISTRATOR AND  
 SURPLUS PROPERTY ADMINISTRATOR, APPELLEE

United States Court of Appeals for the District of Columbia.  
 Filed Feb. 7, 1948. Joseph W. Stewart, Clerk.

*Counter designation of record in this court*

The Clerk will please include in the certified transcript of record for use in the Supreme Court of the United States in the above entitled cause, the following:

- (1) Appellant's motion (filed May 16, 1947) to advance hearing and to grant leave for mimeographed briefs and accompanying motion and affidavit attached thereto (except memorandum supporting motion).

(2) This designation.

(3) Clerk's certificate.

T. PETER ANSBERRY,

STEPHEN J. McMAHON, Jr.,

*Attorneys for Appellant.*

FEBRUARY 3, 1948.

We certify that one copy of this counter designation of record has this day been placed in an envelope and mailed to Oscar Davis, Department of Justice, attorney for appellee.

T. PETER ANSBERRY,

STEPHEN J. McMAHON, Jr.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 64, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the record and proceedings in said Court of Appeals as designated by counsel for appellant and appellee in the case of: Domestic and Foreign Commerce Corporation, appellant, *vs.* Robert M. Littlejohn, as War Assets Administrator and Surplus Property Administrator, appellee, No. 9553, January Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this tenth day of February, A. D. 1948.

[SEAL]

(S) JOSEPH W. STEWART,

*Clerk of the United States Court of Appeals  
for the District of Columbia.*



## Supreme Court of the United States

*Order allowing certiorari*

(Filed April 19, 1948)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U. S.

U. S. Supreme Court, U. S.

FILED

MAR 15 1948

CLERK OF SUPREME COURT

No. 645

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINIS-  
TRATOR AND SURPLUS PROPERTY ADMINISTRATOR,  
PETITIONER

DOMESTIC AND FOREIGN COMMERCE CORPORATION

PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA



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## OPINIONS BELOW

The District Court of the United States for the District of Columbia filed no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 55-59) has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1947 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether a suit brought against the head of the War Assets Administration, an unincorporated nonsuable government agency charged with the disposition of surplus government property, to enjoin disposition of coal possessed by the United States and to which the United States claims title, is an unconsented suit against the United States which should be dismissed on the complaint for want of jurisdiction, where the plaintiff's sole claim is that the United States contracted to sell the coal to plaintiff, that title thereto passed before delivery or payment, and that delivery of the coal was wrongfully withheld from plaintiff.



after a dispute as to the plaintiff's compliance with the contract terms.<sup>2</sup>

#### STATUTE INVOLVED

Section 15 of the Surplus Property Act of 1944, Act of October 3, 1944, c. 479, 58 Stat. 765, 772-773, 50 U. S. C. App., Supp. V, 1615, provides as follows:

SEC. 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: *Provided, however,* That in the case of raw materials, consumer goods, and small tools, hardware, and nonassembled articles which may be used in the manufacture of more than one type of product, no extension of credit under this Act shall be for a longer period than three years.

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in prop-

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<sup>2</sup> In the event that the petition for a writ of certiorari is granted, petitioner will also urge that the Court of Appeals erred in holding that respondent's remedy at law was inadequate, and that "the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief" (R. 58).

erty or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.<sup>3</sup>

#### STATEMENT

This suit was instituted by a complaint for an injunction and a declaratory judgment filed on April 29, 1947, in the District Court of the United States for the District of Columbia (R. 1-32). The facts alleged in the complaint and appearing in the exhibits thereto were as follows:

Respondent is a Delaware corporation, with its principal office in Washington, D. C., engaged in the export and import business, particularly in coal (R. 2). During 1946, it had purchased from the War Assets Administration, at a price of \$1.75 per ton, government-owned war surplus coal located at various Army camps in Texas and adjacent states, which respondent then sold for export (R. 2). On March 11, 1947, the War Assets Administration, through its Dallas Regional Office, invited a bid from respondent for another 10,000 tons of government-owned bituminous coal, stating "This coal is offered F. O. B. cars, Camp Maxey, north of Paris,

<sup>3</sup> The Act of September 18, 1945, c. 368, 59 Stat. 533, 50 U. S. C. App., Supp. V, 1614a-1614b, transferred the powers, authority, and duty of the Surplus Property Board to a Surplus Property Administrator.



Texas" (R. 2-3, 11). On March 13, 1947 respondent telegraphed its offer to purchase the coal "on same terms and conditions and made a continuing part of our recent contract at same price"; it indicated the coal was to be exported, and proposed that "contract shall be on cash basis based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank in Dallas" (R. 3, 12). War Assets Administration's answering letter, of March 19, accepted the offer of \$1.75 per ton, and also "your terms of placing \$17,500 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank," adding that respondent might prefer to deposit the \$17,500 with War Assets' Dallas office for deductions as shipments were made, any balance to be refunded to respondents (R. 3, 13).

Respondent then executed War Assets' forms of "Offer to Purchase" and "Sales Memorandum" (R. 3, 14-17). The standard conditions of sale contained in both of these documents stated that "Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser" (R. 15, 17), and also that "Unless otherwise specifically stated in the Sales Memorandum, all sales are made f. o. b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser"

(R. 15, 17). The face of the Sales Memorandum signed by respondent also contained the following typewritten statement in the box labeled "Terms": "Cash on presentation of wt. tickets as shipped" (R. 16).<sup>4</sup>

Respondent forwarded these executed documents to War Assets' Dallas office by letter of March 28, 1947, in which it stated that \$5,000 (apparently furnished by the Penn-Pocahontas Coal Company, of New York, who were to export the coal) was that day being deposited with the designated Dallas bank "to apply against the first shipments of this coal," and that "immediately this shipment begins to move, the balance of the funds necessary to meet your invoices upon presentation at the bank will be transferred by the New York bank to the First National Bank of Dallas" (R. 3-4, 18). In immediate response, War Assets wired on April 1st that "First Na-

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<sup>4</sup> The "Offer to Purchase" and the "Sales Memorandum" also provided, among other things, that (a) the Sales Memorandum and its standard conditions of sale constituted the entire agreement and extrinsic variations, modifications, or representations made by the seller's agents were to be of no effect; (b) on default by the buyer in making payment or otherwise, War Assets might on ten days notice rescind the sale or resell for the purchaser's account; (c) risk of loss shall be upon the purchaser if he fails to issue shipping instructions or to remove the goods on time, and upon the seller if the loss occurs prior to timely removal (but the seller's liability was limited to replacement of the property or return of the amount paid); and (d) War Assets reserved the right to cancel the contract where the purchaser was an agent for an undisclosed principal (R. 15, 17).



tional Bank Dallas refuses to guarantee payment for full amount unless \$17,500 is on deposit their bank for this purpose. Unless \$17,500 is deposited First National Bank Dallas for payment of total quantity this coal by noon April 4 sale will be cancelled and other disposition made" (R. 4, 20).

On April 4th, respondent telegraphed War Assets that it had placed with the Dallas bank a "letter of credit covering the balance of \$12,500" and "this places on hand in the First National Bank Dallas the full amount of \$17,500 to meet this purchase" (R. 4, 22). The same day, War Assets' Dallas regional office wired back that unless \$17,500 was deposited with that office or on deposit with the Dallas bank, the telegram was to serve as formal notice that the sale would be cancelled ten days from that date (R. 4-5, 23). On inquiry by respondent from the Dallas bank as to why the letter of credit did not satisfy the Government, the bank wired, on April 10th, that the actual credit from the New York Corn Exchange Bank had not yet been received and War Assets was awaiting its arrival. The telegram also stated that War Assets "express preference for funds to be placed here for payment invoices rather than availability against sight drafts on New York bank" (R. 5, 24). The Dallas bank's confirmatory letter, likewise on April 10th, reiterated that War Assets "prefer that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn

under a letter of credit to be paid in New York." The bank added that, if the New York bank requested it to do so, it would pay the drafts in Dallas "without this bank assuming any responsibility whatsoever \* \* \* but we do not care to assume any responsibility for the payment of the drafts in New York City" (R. 25).

Respondent then had the letter of credit issued by the Corn Exchange Bank, which originally provided for payment of drafts in New York, as War Assets and the Dallas bank correctly understood (R. 5, 26), amended so as to permit payment in Dallas, not later than June 7th, 1947 (R. 5, 27). But the War Assets Administration was informed, on April 16th, by the Dallas bank that it had received a telegram from the New York bank stating that the amendment authorized the Dallas bank to *negotiate* the drafts and documents; the Dallas bank added that it now appeared to have the necessary authority to make *payment*, but only if the original letter of credit, as well as the invoices and proper shipping documents, were presented (R. 5, 28).<sup>5</sup> On the same day, War Assets wired respondent that its "credit division has been notified by First National Bank, Dallas, it does not have sufficient authority to

<sup>5</sup> On April 19, 1947, a correcting letter (not included in the record, was written by the Dallas bank to War Assets' Dallas office advising that on that day the bank had received a wire from the Corn Exchange Bank authorizing it to make payment, and not only to negotiate the drafts.



pay for this material upon presentation of invoices. This is formal notification sale is cancelled" (R. 5, 29).<sup>\*</sup> Respondent immediately protested, claiming that it had complied with all contract requirements, and that a bona fide letter of credit had been established in accordance with the usual commercial procedure; it stated that it regarded the contract as still in effect (R. 6, 30-31). Respondent alleges that it received no replies to these telegrams of protest (R. 6).

Shortly thereafter, respondent was informed that the War Assets Administration had entered into a new contract to sell the coal in question to another concern, the Midland Coal Company, but that delivery had not been made at the time suit was brought (R. 6, 7). Respondent had itself, immediately after receiving War Assets' acceptance of March 19th, resold the coal to the Penn-Pocahontas Coal Company, at a price of \$2.75 per ton plus 45% of any receipts in excess of \$3.75 per ton on resale by Penn-Pocahontas (R. 7). The complaint also alleged that Penn-Pocahontas had meanwhile resold the coal to the Portuguese government, at a price between \$8.50 and \$9.00 per ton f. o. b. Texas port (R. 7).

The complaint concluded by averring that legal title to the coal had passed to respondent when War Assets accepted its purchase offer on March

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<sup>\*</sup> The complaint nowhere alleges that War Assets Administration ever itself saw the letter of credit prior to cancellation. Cf. R. 38, 41, 42.

19, that respondent had fully complied with all the terms of the contract, that if it did not acquire the coal its standing with the trade and the Penn-Pocahontas Company would be lost, that it would lose its profits and be liable in damages to the repurchaser, and that because of the difficulty of ascertaining either damages or profits it had no adequate remedy at law (R. 6-8). The prayer was for a temporary restraining order, preliminary injunction, and permanent injunction prohibiting petitioner from cancelling the sale to respondent, and from reselling or delivering the coal to any other person; a declaration that the sale to respondent was still valid, and the later sale to Midland Coal Company invalid, was also asked (R. 8-9).

On the basis of the complaint, and a supporting affidavit of respondent's president generally affirming the complaint's allegations (R. 33-34), a temporary restraining order was issued *ex parte* on the day the complaint was filed (April 29, 1947), which restrained any disposition of the coal other than to respondent (R. 35-36). The matter of the issuance of a preliminary injunction was set for hearing on May 6, 1947 (R. 36).

On that day, petitioner moved to dismiss the complaint on the grounds (a) that the action was an unconsented suit against the United States for specific performance of a contract to sell coal, and (b) that the complaint failed to state a



claim upon which relief might be granted (R. 36-37). Petitioner also filed an affidavit of Walter N. Day, Director of the Credit Division of War Assets, to the effect that (i) it was the War Assets Administration's policy to retain title to property until it was turned over to a common carrier, at which time payment was due, (R. 38-39), (ii) that this policy was embodied in various provisions of War Assets' standard conditions of sale (R. 39), (iii) that War Assets understood the instant agreement to require that funds for full payment be deposited by respondent with the Dallas bank prior to any shipments (R. 39-40), (iv) that in War Assets' view respondent had never complied with these terms of the contract (R. 40-43), and (v) that had War Assets been willing to accept a letter of credit in place of the original agreement for cash, the one proffered by respondent would have been unsatisfactory for several reasons (R. 42-43). Petitioner likewise filed an affidavit of W. T. Lennon, an employee

The defects in respondent's letter of credit proposal were said to be (R. 42): (1) shipment in full was required by May 31, 1947, but no shipping instructions had been received, leaving War Assets without assurance of shipment in full by that date; (2) under the letter of credit payment was conditioned upon presentation of the original and duplicate of a letter from Penn-Pocahontas (the repurchaser) to respondent giving certain shipping instructions (R. 26), which letters War Assets had never seen or heard about; (3) the time for presentation, June 1st might prove insufficient; and (4) the original letter of credit, which War Assets had never seen, had to be presented for each payment.

of the Administration, that prior to the institution of the action, personnel and equipment had been directed to Camp Maxey to load the coal for delivery to Midland Coal Company, and that the restraining order prohibiting the loading had damaged War Assets (R. 43-44).<sup>8</sup>

After argument on respondent's motion for a preliminary injunction (R. 48), the district court dissolved the temporary restraining order and denied the application for a preliminary injunction on the ground "that this suit is in effect a suit for specific performance and the United States is a necessary party, and this Court is without jurisdiction" (R. 48). After respondent's counsel indicated, in open court, his intention to appeal, the district court stated that "if you want to get a stay order from the Court of Appeals, I think you had better let me pass on the motion to dismiss, because I think this opinion so far decides that question" (R. 48), and sustained the petitioner's motion to dismiss (R. 48). The order, judgment, and decree, filed May 9, 1947, denied respondent's motion for a preliminary injunction, granted petitioner's motion to dismiss the complaint, and dismissed the complaint with prejudice (R. 49-50).<sup>9</sup>

<sup>8</sup> Petitioner need not, and does not here, rely on the affidavits of Day and Lennon, since the question now presented arises on the allegations of respondent's complaint and the exhibits thereto.

<sup>9</sup> Delivery of the coal to another buyer was enjoined, first by the district court and then by the Court of Appeals, pend-



Appeal was taken to the United States Court of Appeals for the District of Columbia<sup>10</sup> which reversed and remanded the case, holding that the district court "erred in dismissing the complaint in the belief that it lacked jurisdiction" (R. 59). The Court of Appeals stated that "it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated" between the parties, and whether title had passed as alleged by respondent (R. 58). The court was also of the view that, if the contract had been breached by War Assets

ing final disposition of the appeal to the latter court. Although the United States sought to have a \$20,000 injunction bond given by respondent, the only protection to the United States consisted of an inadequate injunction bond of \$1,000 (R. 50).

<sup>10</sup> In the Court of Appeals, respondent filed, together with a motion for leave to file, an affidavit of its president, never received by the district court, in opposition to the Lennon affidavit filed by petitioner in the district court (R. 51-54). This affidavit details respondent's version of its dealings with officials of the War Assets Administration, on and after April 18, 1947, and sets forth respondent's information as to the equipment and personnel directed by the Administration to Camp Maxey for the purpose of loading the coal. The court below never passed upon respondent's motion for leave to file this affidavit. We believe this affidavit to form no part of the true record in this case, since it was not filed in the district court nor received by the Court of Appeals. Moreover, we believe the affidavit to have no bearing on any question presented by this petition. For these reasons, petitioner did not seek to file answering affidavits, although several of the respondent's affidavit's statements are believed to be inaccurate. Cf. note 8, *supra*, p. 12.

Administration to respondent's detriment, "the peculiar nature of the coal involved soundly bases [respondent's] resort to equity for relief" (R. 58).

#### SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In failing to hold that the district court does not have jurisdiction of this suit.

3. In holding that the district court could not determine whether or not it had jurisdiction of this suit without a trial and a determination of respondent's allegations that title to the property had passed to it and that its contract had been breached to its detriment, and in holding that the district court has jurisdiction to try and determine those issues in this action.

4. In holding that petitioner's discretion was fully "exercised at the time the contract with appellant was entered into" (R. 58), and that he thereafter possessed no discretion in the matter.

5. In holding that the district court had equitable jurisdiction to grant the relief prayed for, that the respondent did not have a plain, adequate, and complete remedy at law, and that the nature of the coal involved was so "peculiar" as to warrant resort to equity for relief.



6. In reversing the judgment of the district court dismissing the complaint herein.

#### REASONS FOR GRANTING THE WRIT

The court below has, we submit, contrary to repeated decisions by this Court, held that a suit may be maintained against a government official, in his official capacity, to compel specific performance of a contract entered into by the United States. In so holding it apparently relied upon the recent opinion of this Court in *Land v. Dollar*, 330 U. S. 731, as overruling or disapproving prior decisions of the Court to the contrary, notwithstanding the specific disclaimer made in that opinion of any intention to reach such a result (330 U. S. at 737-738). If, however, the principle of *Land v. Dollar* is to be extended to suits for specific performance of government contracts on the plaintiff's naked allegation that title has passed, we submit that this should be done only after considered review by this Court.

1. (a) The history of this transaction, as revealed on the face of the complaint, shows that, in all but the defendant's name, the suit is one to compel specific performance by the United States of an agreement to sell certain government-owned coal to respondent. The coal was admittedly the property, and in the possession, of the United States, which duly entered into a conventional sales contract for its disposition. Before removal of the coal from the government's possession, a

dispute arose as to respondent's compliance with the payment requirements of the contract, and the Government refused delivery on the ground that respondent, having failed to fulfill its contractual obligation to make a single cash payment, thereby breached the agreement. As is usual in such cases, respondent contended that it had fully performed its undertakings, and that title had passed to it, while the Government, for its part, claimed both that respondent was in default and that full title remained in the United States. Asserting that the coal was unique and that damages would afford an insufficient remedy, the respondent then brought this action against the head of the government agency charged with the disposition of the coal, naming him solely in his official capacities and not as a private person, and omitting any allegation that he had any personal knowledge of the transaction (R. 1, 2). As if it were suing a recalcitrant private vendor for specific performance, respondent sought an injunction against the "cancellation of the sale to the plaintiff of this coal" and a decree that the "sale of this coal to the plaintiff \* \* \* is still valid and in effect" (R. 8). "An injunction against the breach of a contract is a negative decree of specific performance of the agreement" (*Shubert v. Woodward*, 167 Fed. 47, 53 (C. C. A. 8)), and respondent's whole effort is plainly to compel the War Assets Administrator, as an official of the United States, to perform the United States' con-



tract by officially ordering his subordinates to load the 10,000 tons of coal upon receipt of respondent's shipping orders, and to accept payment to the United States as proffered by respondent.<sup>11</sup>

(b) The Court of Appeals should have dismissed this action, as did the district court, under the settled rule, consistently announced by this Court and the court below over the past sixty-five years, which denies to federal courts jurisdiction to entertain proceedings seeking an injunction or a writ of mandamus directing specific enforcement of a contract made by the sovereign, though the complaint nominally may be against an individual public official. *Louisiana v. Jumel*, 107 U. S. 711, 721; *Hagood v. Southern*, 117 U. S. 52, 68; *In re Ayers*, 123 U. S. 443, 502-503; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10-11; *Ex parte Young*, 209 U. S. 123, 151-152; *Hopkins v. Clemson College*, 221 U. S. 636, 642; *Goldberg v. Daniels*, 231 U. S. 218; *Wells v. Roper*, 246 U. S. 335; *Ex parte New York*, 256 U. S. 490, 500; *Goltra v. Weeks*, 271 U. S. 536, 546; *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371; *Land v. Dollar*, 330 U. S. 731, 737; *United States ex rel. Shoshone Irr. Dist. v. Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571; *Trans-*

<sup>11</sup> Respondent's complaint also prayed (R. 9): "That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions."

*continental & Western Air, Inc. v. Farley*, 71 F. 2d 288, 290-292 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Boeing Air Transport v. Farley*, 75 F. 2d 765, 768 (App. D. C.), certiorari denied *sub nom. Pacific Air Transport v. Farley*, 294 U. S. 728; *O'Harra v. Littlejohn*, 69 F. Supp. 274, 276 (D. D. C.).

The gist of this rule applying the bar of sovereign immunity to actions such as this, and the reasons for the Court's constant reaffirmation of the principle, were shortly put in *Ex parte Young*, 209 U. S. 123, 151, where, speaking of state contracts, this Court said: "The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State. \* \* \* A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." To secure relief in these cases the plaintiff must of necessity endow the defendant with official character, as respondent implicitly recognizes in the caption of its suit (R. 1, 2), and thus confess the sovereign as the real party in interest. Cf. *Cunningham v. Mason & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Belknap v. Schild*, 161 U. S. 10, 25; *Hagood v. Southern*, 117 U. S. 52,



69-70; *Wells v. Roper*, 246 U. S. 335.<sup>12</sup> By the Tucker Act and the Federal Tort Claims Act, the sovereign has provided a forum which can award money damages against the Government for breach of contract or for certain types of tort, but, of course, the United States has not yet permitted itself to be sued for specific performance. *Land v. Dollar*, 330 U. S. 731, 737, and cases cited *supra* at pp. 17-18.

(c) There is nothing in the instant complaint setting this case beyond the reach of the established rule and the authoritative cases. Allegations that title has passed and that the would-be purchaser is now the "owner" of the property to be sold by the United States (R. 6-7) were held immaterial in 1913 in *Goldberg v. Daniels*, 231 U. S. 218, where this Court affirmed the dismissal of a similar suit.<sup>13</sup> Application of the sovereign

<sup>12</sup> An analogous principle is set forth in *Williams v. Fanning*, 332 U. S. 490, holding that a superior need not be joined in an action against his subordinate; where the judgment will expend itself on the subordinate alone and the superior will not be required to take new action either directly or indirectly through his subordinate. Conversely, in an action such as this, the defending public official cannot satisfy the plaintiff as a private person but must take new action on behalf of and as an agent of the United States. The United States is therefore either the real party in interest or an indispensable party defendant.

<sup>13</sup> The petition for writ of mandamus in *Goldberg v. Daniels*, *supra*, alleged (R. 4, No. 79, Oct. T. 1913): "13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser *Boston* to him."

immunity bar should not turn on the pleader's use or misuse of technical doctrines of passage of title where the transaction is plainly a normal sales arrangement and the property remains in the possession of the United States which claims continued ownership in itself; in a suit against a public official to secure the goods, "the dominant interest of the sovereign" (*Land v. Dollar*, 330 U. S. 731, 738) would hardly be on the side of a plaintiff with no more than such a formal "property interest." Nor can petitioner be said to be a private tortfeasor interfering with respondent's property, as in *Land v. Dollar*, *supra*, at 736, 738, any more than an employee of a private corporation who cancels a similar contract in the name of and on behalf of his employer. There has been no personal misconduct on petitioner's part. Indeed, the complaint does not even allege that he had any knowledge of the transaction prior to the filing of the complaint. And, contrary to the Court of Appeals' intimations (R. 58), it is also settled that contracting officials of the Government do not normally exceed their authority when they misconstrue the terms of an agreement and thus cause an actionable breach by the Government. *Wells v. Roper*, 246 U. S. 335, 337-338; cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 127-132. Here, the War Assets Administrator had full statutory power to enter into a disposal contract on terms he saw fit (*supra*, pp. 3-4), and the breadth of his authority



proves that petitioner's official power was not limited to a correct interpretation of those contractual terms. The refusal to deliver the coal was thus an authorized act, though it may have resulted in a breach by the Government of the sales contract for which the United States might be held liable in the Court of Claims. Certainly it cannot even be said, in view of the petitioner's wide statutory authority and the parties' substantial dispute over the contract's meaning, that the War Assets' officials' duty to perform the agreement was plainly ministerial and non-discretionary, an indispensable prerequisite to any action for mandamus or a mandatory injunction. *Brashear v. Mason*, 6 How. 92, 102; *United States ex rel. International Contracting Co. v. Lamont*, 155 U. S. 303; *Goldberg v. Daniels*, 231 U. S. 218; *Wilbur v. United States*, 281 U. S. 206, 218-219.

(d) *Lund v. Dollar*, 330 U. S. 731, itself supports the view that this is an action against the United States. The Court expressly distinguished an "attempt to get specific performance of a contract to deliver property of the United States" (330 U. S. at 737); and the general test laid down, there and in *Williams v. Fanning*, 332 U. S. 490, would designate this suit as one against the sovereign. For the "essential nature and effect of the proceeding" are such that the judgment sought by respondent would both "expend itself on the public \* \* \* domain" and "interfere with the public administration." 330

U. S. at 738. Coal forming part of the United States' surplus stores, and in its custody, would be abruptly transferred out of its hands by court order. Under the decision below, disposal of such government surplus can be, and in this case, has been, stopped completely by temporary restraining orders or injunctions, and to that extent the aim of the Surplus Property Act of 1944 to foster speedy disposition of these assets is frustrated. Cf. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine* (1946) 59 Harv. L. Rev. 1060, 1075.<sup>14</sup> Moreover, the substitution of this type of injunctive proceeding for a statutory action under the Tucker Act deprives the United States of the protection of the latter's time and procedural provisions, with substantial detriment to the conduct of the Government's contract litigation.

2. The question is one of general importance which warrants decision here. The courts of the District of Columbia are the principal forum for suits against government agencies, and the decision below, with its implication that a public official misconstrues a government contract at his peril, will both invite and control a substantial body of litigation. Use of equity actions in dis-

<sup>14</sup> Even if restraining orders, injunctions, or stays are not issued, the mere pendency of the action may well prevent disposition of the property to the prejudice of efficient administration. Cf. *Jones v. Securities & Exchange Comm.*, 298 U. S. 1, 17-18.



putes arising from the disposal of government property has become quite frequent in the past year,<sup>15</sup> and the instant opinion will largely govern the proceedings in such cases. Its sweeping language will probably also find application in actions touching upon other areas of government procurement and distribution activity. The field of government contractual relations is pre-eminently one, in our view, where it is important that the waiver of immunity be not extended beyond the boundaries expressly authorized by Congress.

#### CONCLUSION

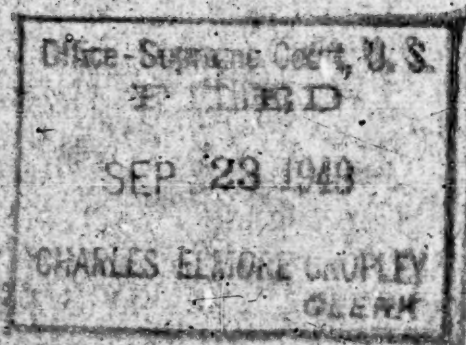
For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

MARCH 1948.

<sup>15</sup> Several cases of this type have been brought in the District Court for the District of Columbia in the last nine months, and some in other districts, in most of which temporary restraining orders or stays were sought, and usually granted.

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SUPREME COURT, U. S.



No. 31

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*In the Supreme Court of the United States*

OCTOBER TERM, 1948

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JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, PETITIONER

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA

---

BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 31

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, PETITIONER

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The District Court of the United States for the District of Columbia filed no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 55-59) is reported at 165 F. 2d 235.

### JURISDICTION

The judgment of the court of appeals was entered on December 8, 1947 (R. 59). The petition for a writ of certiorari was filed on March 5, 1948, and granted on April 19, 1948 (R. 62). The juris-

diction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.<sup>1</sup>

#### QUESTIONS PRESENTED

1. Whether a suit brought against the head of the War Assets Administration, an unincorporated nonsuable government agency charged with the disposition of surplus government property, to enjoin disposition of coal possessed by the United States and to which the United States claims title, is an unconsented suit against the United States which should be dismissed on the complaint for want of jurisdiction, where the plaintiff's sole claim is that the United States contracted to sell the coal to plaintiff, that title thereto passed before delivery or payment, and that delivery of the coal was wrongfully withheld from plaintiff after a dispute as to the plaintiff's compliance with the contract terms.

2. Whether, in these circumstances, respondent has an adequate remedy at law barring equitable relief.

3. Whether the Court of Appeals may properly determine, on respondent's complaint, that the coal involved is of such a "peculiar nature" as to warrant equitable relief.

<sup>1</sup> Effective September 1, 1948, 28 U. S. C. 1254 (1) became the jurisdictional basis for cases of this type. Pub. L. No. 773, 80th Cong., 2d Sess.

## STATUTE INVOLVED

Section 15 of the Surplus Property Act of 1944, Act of October 3, 1944, c. 479, 58 Stat. 765, 772-773, 50 U. S. C. App. 1624, provides as follows:

SEC. 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: *Provided, however,* That in the case of raw materials, consumer goods, and small tools, hardware, and nonassembled articles which may be used in the manufacture of more than one type of product, no extension of credit under this Act shall be for a longer period than three years.

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

<sup>2</sup> The Act of September 18, 1945, c. 368, 59 Stat. 533, 550 U. S. C. App. 1614a-1614b, transferred the powers, authority, and duty of the Surplus Property Board to a Surplus Property Administrator.



## STATEMENT

This suit was instituted by a complaint for an injunction and a declaratory judgment filed on April 29, 1947, in the United States District Court for the District of Columbia (R. 1-32). The original defendant was Robert M. Littlejohn, then the War Assets Administrator and Surplus Property Administrator, who was sued as such (R. 1, 2).<sup>3</sup> The facts alleged in the complaint and appearing in the exhibits thereto<sup>4</sup> were as follows:

<sup>3</sup> On April 19, 1948, this Court granted the Government's motion to substitute Jess Larson, present War Assets Administrator and Surplus Property Administrator, as petitioner herein (Journal of Sup. Ct. April 19, 1948, p. 221). General Littlejohn resigned those offices on November 28, 1947, and Mr. Larson assumed office the same day.

The War Assets Administration, headed by the War Assets Administrator, was established by Executive Order No. 9689 (dated January 31, 1946) ("Consolidation of Surplus Property Functions"), 3 CFR, 1946 Supp., pp. 93-94, as amended by Executive Order No. 9707 (dated March 23, 1946), 3 CFR, 1946 Supp., pp. 114-115. These Orders transferred, *inter alia*, the functions and authority of the Surplus Property Administrator and the Surplus Property Administration (see (fn. 2, *supra*, p. 3) (except those relating to surplus property in foreign territory) to the new War Assets Administration and the War Assets Administrator. Reorganization Plan 1 of 1947, effective July 1947, 12 Fed. Reg. 4534-5, gave non-temporary legislative status, in effect, to the War Assets Administration and its Administrator.

<sup>4</sup> The exhibits are properly considered a part of the complaint for all purposes. F. R. C. P., Rule 10 (c); *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 153, 155-6 (App. D. C.), certiorari denied, 316 U. S. 700; *Aralac, Inc. v. Hat Corporation of America*, 166 F. 2d 286, 289 (C. C. A. 3).

Respondent is a Delaware corporation, with its principal office in Washington, D. C., engaged in the export and import business, particularly in coal (R. 2). During 1946, it had purchased from the War Assets Administration, at a price of \$1.75 per ton, government-owned war surplus coal located at various Army camps in Texas and adjacent States, which respondent then sold for export (R. 2). On March 11, 1947, the War Assets Administration, through its Dallas Regional Office, invited a bid from respondent for another 10,000 tons of government-owned bituminous coal, stating "this coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas" (R. 2-3, 11).<sup>5</sup> On March 13, 1947, respondent telegraphed its offer to purchase the coal "on same terms and conditions and made a continuing part of our recent contract at same price"; it indicated the coal was to be exported, and proposed that "contract shall be on cash basis, based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank

<sup>5</sup> At all times relevant to this case, War Assets Administration was the proper disposal agency for surplus coal, as designated in its own orders and regulations as successor to the original Surplus Property Board and Surplus Property Administrator. 32 CFR, 1946 Supp., 8301.2 (g). See Surplus Property Act of 1944, as amended, sections 6, 9, 10, 11, and 15, 50 U. S. C. App. 1615, 1618, 1619, 1620, and 1624 (for statutory authority of the War Assets Administration and War Assets Administrator as successor to the Surplus Property Board and as a disposal agency). Cf. fn. 2 and 3, *supra*, pp. 3-4.

in Dallas" (R. 3, 12). War Assets Administration's answering letter, of March 19, accepted the offer of \$1.75 per ton, and also "your terms of placing \$17,500 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank," adding that respondent might prefer to deposit the \$17,500 with War Assets' Dallas office for deductions as shipments were made, any balance to be refunded to respondent (R. 3, 13).

Respondent then executed War Assets' forms of "Offer to Purchase" and "Sales Memorandum" (R. 3, 14-17). The standard conditions of sale contained in both of these documents stated that "Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser" (R. 15, 17); and also that "Unless otherwise specifically stated in the Sales Memorandum, all sales are made f. o. b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser" (R. 15, 17). The face of the Sales Memorandum signed by respondent also contained the following typewritten statement in the box labeled "Terms": "Cash on presentation of wt. tickets as shipped" (R. 16).

The "Offer to Purchase" and the "Sales Memorandum" also provided, among other things, that (a) the Sales Memorandum and its standard conditions of sale constituted the entire agreement and extrinsic variations, modifications, or



Respondent forwarded these executed documents to War Assets' Dallas office by letter of March 28, 1947, in which it stated that \$5,000 (apparently furnished by the Penn-Pocahontas Coal Company, of New York, which was to export the coal) was that day being deposited with the designated Dallas bank "to apply against the first shipments of this coal," and that "immediately this shipment begins to move, the balance of the funds necessary to meet your invoices upon presentation at the bank, will be transferred by the New York bank to the First National Bank of Dallas" (R. 3-4, 18). In immediate response, War Assets wired on April 1st that "First National Bank Dallas refuses to guarantee payment for full amount unless \$17,500 is on deposit their bank for this purpose. Unless \$17,500 is deposited First National Bank Dallas for payment of total quantity this coal by noon April 4 sale will be cancelled and other disposition made" (R. 4, 29).

representations made by the seller's agents were to be of no effect; (b) on default by the buyer in making payment or otherwise, War Assets might on ten days' notice rescind the sale or resell for the purchaser's account; (c) risk of loss shall be upon the purchaser if he fails to issue shipping instructions or to remove the goods on time, and upon the seller if the loss occurs prior to timely removal (but the seller's liability was limited to replacement of the property or return of the amount paid); and (d) War Assets reserved the right to cancel the contract where the purchaser was an agent for an undisclosed principal (R. 15, 17).

On April 4th, respondent telegraphed War Assets that it had placed with the Dallas bank a "letter of credit covering the balance of \$12,500" and "this places on hand in the First National Bank Dallas the full amount of \$17,500 to meet this purchase" (R. 4, 22). The same day, War Assets' Dallas regional office wired back that unless \$17,500 was deposited with that office or on deposit with the Dallas bank, the telegram was to serve as formal notice that the sale would be cancelled ten days from that date (R. 4-5, 23). On inquiry by respondent from the Dallas bank as to why the letter of credit did not satisfy the Government, the bank wired, on April 10th, that the actual credit from the New York Corn Exchange Bank had not yet been received and War Assets was awaiting its arrival. The telegram also stated that War Assets "express preference for funds to be placed here for payment invoices rather than availability against sight drafts on New York Bank" (R. 5, 24). The Dallas bank's confirmatory letter, likewise on April 10th, reiterated that War Assets, "prefer that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn under a letter of credit to be paid in New York." The bank added that, if the New York bank requested it to do so, it would pay the drafts in Dallas "without this bank assuming any responsibility whatsoever \* \* \* but we do not care to assume any responsibility

for the payment of the drafts in New York City" (R. 25).

Respondent then had the letter of credit issued by the Corn Exchange Bank, which originally provided for payment of drafts in New York, as War Assets and the Dallas bank correctly understood (R. 5, 26), amended so as to permit negotiation in Dallas, not later than June 7, 1947 (R. 5, 27). The Dallas bank then sent the War Assets Administration a letter, dated April 16th, informing War Assets that that bank had received a telegram from the New York bank stating that the amendment authorized the Dallas bank to *negotiate* the drafts and documents; the Dallas bank added that it now appeared to have the necessary authority to make *payment*, but only if the original letter of credit as well as the invoices and proper shipping documents, were presented (R. 5, 28). On the same day, War Assets wired respondent that its "credit division has been notified by First National Bank, Dallas, it does ~~not~~ have sufficient authority to pay for this material upon presentation of invoices. This is formal notification sale is cancelled" (R. 5,

Three days later, on April 19, 1947, a letter (not included in the record), was written by the Dallas bank to War Assets' Dallas office, quoting a correcting telegram which the bank had received on that day from the Corn Exchange Bank, which telegram stated that the New York bank's earlier wire "should have read drafts and documents presented at your office not later than June seventh instead of negotiated at your office stop pay drafts when presented at your office debiting our account with your good selves."



29). Respondent immediately protested, claiming that it had complied with all contract requirements, and that a *bona fide* letter of credit had been established in accordance with the usual commercial procedure; it stated that it regarded the contract as still in effect (R. 6, 30-31). Respondent alleges that it received no replies to these telegrams of protest (R. 6).

Shortly thereafter, respondent was informed that the War Assets Administration had entered into a new contract to sell the coal in question to another concern, the Midland Coal Company, but that delivery had not been made at the time suit was brought (R. 6, 7). Respondent had itself, immediately after receiving War Assets' acceptance of March 19th, resold the coal to the Penn-Pocahontas Coal Company, at a price of \$2.75 per ton plus 45% of any receipts in excess of \$3.75 per ton on resale by Penn-Pocahontas (R. 7). The complaint also alleged that Penn-Pocahontas had meanwhile resold the coal to the Portuguese government, at a price between \$8.50 and \$9.00 per ton f. o. b. Texas port (R. 7).

The complaint concluded by averring that legal title to the coal had passed to respondent when War Assets accepted its purchase offer on March 19, that respondent had fully complied with all the terms of the contract, that if it did not acquire

<sup>8</sup> The complaint nowhere alleges that War Assets Administration ever itself saw the letter of credit prior to cancellation. Cf. R. 37, 41, 42.

the coal its standing with the trade and the Penn-Pocahontas Company would be lost, that it would lose its profits and be liable in damages to the repurchaser, and that because of the difficulty of ascertaining either damages or profits it had no adequate remedy at law (R. 6-8). The prayer was for a temporary restraining order, preliminary injunction, and permanent injunction prohibiting petitioner's predecessor from cancelling the sale to respondent, and from reselling or delivering the coal to any other person; a declaration that the sale to respondent was still valid, and the later sale to Midland Coal Company invalid, was also asked (R. 8-9).

On the basis of the complaint, and a supporting affidavit of respondent's president generally affirming the complaint's allegations (R. 33-34), a temporary restraining order was issued *ex parte* on the day the complaint was filed (April 29, 1947), which restrained any disposition of the coal other than to respondent (R. 35-36). The matter of the issuance of a preliminary injunction was set for hearing on May 6, 1947 (R. 36).

On that day, petitioner's predecessor moved to dismiss the complaint on the grounds (a) that the action was an unconsented suit against the United States for specific performance of a contract to sell coal, and (b) that the complaint failed to state a claim upon which relief might be granted (R. 36-37). There was also filed an affidavit of Walter N. Day, Director of the Credit Division

of War Assets, to the effect that (i) it was the War Assets Administration's policy to retain title to property until it was turned over to a common carrier, at which time payment was due (R. 38-39), (ii) that this policy was embodied in various provisions of War Assets' standard conditions of sale (R. 39), (iii) that War Assets understood the instant agreement to require that funds for full payment be deposited by respondent with the Dallas bank prior to any shipments (R. 39-40), (iv) that in War Assets' view respondent had never complied with these terms of the contract (R. 40-43), and (v) that had War Assets been willing to accept a letter of credit in place of the original agreement for cash, the one proffered by respondent would have been unsatisfactory for several reasons (R. 42-43).<sup>9</sup> Petitioner's predecessor likewise filed an affidavit of W. T. Lennon, an employee of the Administration, that prior to the institution of the action, personnel and equipment had been directed to Camp Maxey to load the

<sup>9</sup> The defects in respondent's letter of credit proposal were said to be (R. 42): (1) shipment in full was required by May 31, 1947, but no shipping instructions had been received, leaving War Assets without assurance of shipment in full by that date; (2) under the letter of credit, payment was conditioned upon presentation of the original and duplicate of a letter from Penn-Pocahontas (the repurchaser) to respondent giving certain shipping instructions (R. 26), which letters War Assets had never seen or heard about; (3) the time for presentation, June 7th, might prove insufficient; and (4) the original letter of credit, which War Assets had never seen, had to be presented for each payment.



coal for delivery to Midland Coal Company, and that the restraining order prohibiting the loading had damaged War Assets (R. 43-44).<sup>10</sup>

After argument on respondent's motion for a preliminary injunction (R. 48), the district court dissolved the temporary restraining order and denied the application for a preliminary injunction on the ground "that this suit is in effect a suit for specific performance and the United States is a necessary party; and this Court is without jurisdiction" (R. 48). After respondent's counsel indicated, in open court, his intention to appeal, the district court stated that "if you want to get a stay order from the Court of Appeals, I think you had better let me pass on the motion to dismiss, because I think this opinion so far decides that question" (R. 48), and sustained the motion to dismiss (R. 48). The order, judgment, and decree, filed May 9, 1947, denied respondent's motion for a preliminary injunction, granted petitioner's predecessor's motion to dismiss the complaint, and dismissed the complaint with prejudice (R. 49-50).<sup>11</sup>

<sup>10</sup> Petitioner need not, and does not here, rely on the affidavits of Day and Lennon, since the question now presented arises on the allegations of respondent's complaint and the exhibits thereto. Cf. *Land v. Dollar*, 330 U. S. 731, 735.

<sup>11</sup> Delivery of the coal to another buyer was enjoined, first by the district court and then by the court of appeals, pending final disposition of the appeal to the latter court. Although the Government sought to have a \$20,000 injunction bond given by respondents, the only protection to the United States consisted of an inadequate injunction bond of \$1,000 (R. 50).

Appeal was taken to the United States Court of Appeals for the District of Columbia<sup>12</sup> which reversed and remanded the case, holding that the district court "erred in dismissing the complaint in the belief that it lacked jurisdiction" (R. 59). The court of appeals stated that "it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated" between the parties, and whether title had passed as alleged by respondent (R. 58). The court was also of the view that, if the contract had been breached by War Assets Administration to respondent's detriment, "the peculiar nature of the coal involved

<sup>12</sup> In the court of appeals, respondent filed, together with a motion for leave to file, an affidavit of its president, never received by the district court, in opposition to the Lennon affidavit filed by petitioner's predecessor in the district court (R. 51-54). This affidavit details respondent's version of its dealings with officials of the War Assets Administration, on and after April 18, 1947, and sets forth respondent's information as to the equipment and personnel directed by the Administration to Camp Maxey for the purpose of loading coal. The court below never passed upon respondent's motion for leave to file this affidavit. We believe this affidavit to form no part of the true record in this case, since it was not filed in the district court nor received by the court of appeals. Moreover, we believe the affidavit to have no bearing on any question presented to this Court. For these reasons, petitioner and his predecessor have not sought to file answering affidavits, although several of the respondent's affidavit statements are believed to be inaccurate. Cf. note 10, *supra*, p. 13.

soundly bases [respondent's] resort to equity for relief" (R. 58).

#### SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In failing to hold that the district court does not have jurisdiction of this suit.

3. In holding that the district court could not determine whether or not it had jurisdiction of this suit without a trial and a determination of respondent's allegations that title to the property had passed to it and that its contract had been breached to its detriment, and in holding that the district court has jurisdiction to try and determine those issues in this action.

4. In holding that petitioner's predecessor's discretion was fully "exercised at the time the contract with appellant was entered into" (R. 58), and that he thereafter possessed no discretion in the matter.

5. In holding that the district court had equitable jurisdiction to grant the relief prayed for, that the respondent did not have a plain, adequate, and complete remedy at law, and that the nature of the coal involved was so "peculiar" as to warrant resort to equity for relief.

6. In reversing the judgment of the district court dismissing the complaint herein.



## SUMMARY OF ARGUMENT

## I

This suit is against the United States, which has not consented to be sued; it must therefore be dismissed as outside the jurisdiction of the district court.

A. By means of a suit nominally directed against petitioner's predecessor, respondent has sought to compel specific performance of its sales agreement with the United States. Its aim is to force petitioner, in this Court's words, to do "the very things which when done would constitute a performance" of the contract by the United States, and to forbid him from "the doing of those things which, if done, would be merely breaches of the contract" by the United States. But this is exactly what respondent cannot do, under the unchallengeable rule that courts have no jurisdiction of suits seeking, in effect, specific enforcement of the sovereign's contract. *E. g. Goldberg v. Daniels*, 231 U. S. 218. Not only is a suit of such a nature "simply an attempt to make the [United States] itself, through its officers, perform its alleged contract, by directing those officers to do acts which constitute[d] such performance," but it requires the defending public official to act in his official capacity in order to comply with the court's decree, and this reveals the sovereign as the real party in interest. Here, for instance, petitioner could act only as War

Assets Administrator in ordering his subordinates to load the 10,000 tons of coal on freight cars in accordance with respondent's shipping instructions, and to accept payment as proffered by respondent. And, contrary to respondent's contentions, this is not any the less a suit for specific performance because respondent alleges that title to the coal has already passed to it; nor is the sovereign immunity barrier less applicable because the case involves a single disposition of surplus property and not an agreement concerning, as respondent puts it, "continuing sovereign functions such as carrying the mail."

B. For several separate reasons, the rule of *United States v. Lee*, 106 U. S. 196, and *Land v. Dollar*, 330 U. S. 731, does not apply in the case of an ordinary sale of government property and of the normal suit for specific performance of a public contract, such as this. First, the *Land* opinion expressly distinguishes an "attempt to get specific performance of a contract to deliver property of the United States." Secondly, it is an essential prerequisite in the *Lee-Land* line of authorities, as in all suits against an official, that the plaintiff assert a substantial claim that the defendant is exceeding his statutory or constitutional authority. Here, there is no such allegation, nor could there well be, since government contracting officials endowed with the breadth of statutory authority granted to the War Assets Administration do not normally ex-

ceed their power when they misconstrue the terms of an agreement and thus cause an actionable breach by the United States. Thirdly, the *Lee* and *Land* decisions require the complaining party to state a private common-law tort claim against the defendant, but respondent neither asserts such a claim in its complaint, nor could it well do so. Some argument is now presented that a conversion of the coal occurred, but if that be so, the tort-feasor is solely the United States. The complaint does not allege any personal misconduct, or even knowledge, on the part of the petitioner or his predecessor; the subordinate officials who did participate in the transaction are not tort-feasors under the general rules pertaining to conversion; and even if these subordinate officials be thought to be guilty, it is well settled that their wrong cannot be imputed to their superior (the War Assets Administrator). In any case, the present petitioner, who became Administrator several months after this action was commenced, is not responsible for torts which may have been committed by his predecessor; and, once again, the official relief demanded by respondent shows that petitioner is not being sued as a private tort-feasor. Fourthly, another fundamental factor in the *Lee-Land* authorities is the plaintiffs' claim that the property never belonged to the United States, coupled with an acknowledged substantial interest in the property and possession of it before the United States.



asserted any claim. In the present case, on the other hand, respondent, which has never possessed the coal, must peg its entire claim of a "property interest" on the nebulous, technical, and confused doctrines of passage of "title" under the law of sales. Lastly, the judgments in the earlier cases would not affect the rights of the absent United States; while respondent's prayers (for declarations that "the sale of this coal to plaintiff \* \* \* is still valid and in effect" (R. 8) and that "the purported sale to the Midland Coal Company is illegal" (R. 9), and for an injunction against "cancellation of the sale to the plaintiff" (R. 8)) would necessarily require direct determination of the present status and meaning of the Government's contract, as well as adjudication of its ownership. In our view, respondent's action satisfies none of these five requirements of the *Lee-Land* doctrine; certainly, it does not fulfill them all.

C. Since the contract which respondent seeks specifically to enforce concerns property, an alternative way to view the action is as one to try the title to, and right to possession of, the coal. The established principle is that, except perhaps for cases fully within the *Lee* rule, a suit directly involving the use, possession, or title of property in which the Government claims an interest is a barred suit against the sovereign. The authorities demonstrate that this is true whether or not the governmental title or right is

acknowledged, at least in every case in which the claim of the United States is not merely frivolous. The substantiality of the Government's claim in this case is vindicated in Point III.

D. Our argument that this is an impermissible suit against the United States rests not only on precedent, history, and established principle, but on strong considerations of policy, as well. While it may not stand in high repute with many jurists and lawyers, the sovereign immunity doctrine is imbedded in the Constitution and continues to be largely accepted by Congress and the State legislatures which have power to abolish the privilege. Therefore, it must still be given its due place. The doctrine of sovereign immunity can have no more justified application than in the field of normal government contractual relations, where the private party is a voluntary participant in a consensual transaction, generally commercial in character, and knows both the Government's contractual privileges and the limitation of his remedies to a suit for money damages in the Court of Claims. Respondent, which freely dealt with the Government for its own advantage, has no reason for demanding that an exception be made in its behalf. For the Government, on the other hand, maintenance of the immunity bar in these cases is important in order to prevent undue judicial interference with "the ordinary duties of the executive departments," particularly those func-

tions relating to procurement and to property control, management, and disposal.

To bar this suit is not to leave the respondent without remedy; Congress has, in the Tucker Act, provided a means by which the respondent can be made whole. The substitution of this type of injunctive proceeding for a Tucker Act action deprives the United States of the latter's time and procedural provisions, with substantial detriment to the conduct of the Government's contract litigation, and without adequate protection against damage or loss flowing from unmerited injunction suits. Reasons akin to these have led Congress to limit consent to suits against the United States to claims for money only, both in the Tucker Act and in the recent Federal Tort Claims Act. This express policy should not be contravened by permitting suits for affirmative relief against the sovereign in the guise of actions against individual officials.

E. It is clear that the mandamus exception to the immunity rule is inapplicable here, since no ministerial or non-discretionary act is involved. The War Assets Administrator's authority and discretion under the Surplus Property Act are sufficiently broad to permit him, as the Government's contracting agent, to interpret the terms of the instant agreement and to determine what performance is called for, in the same way that the agent of a private corporation or business would be authorized to act. *Wells v. Roper*, 246



U. S. 335; *Perkins v. Lukens Steel Co.*, 310 U. S. 113.

## II

Even though the complaint be not dismissed as initiating an unconsented suit against the United States, it should be dismissed on the ground that respondent has an adequate remedy at law, in a suit for damages in the Court of Claims. For this reason, specific performance of a contract to deliver non-unique chattels, such as coal, will not be granted; and respondent's complaint nowhere alleges that the instant coal has any special or peculiar status, or that other coal would not have been equally satisfactory. The claim is now made in argument that surplus coal receives special export allocations not available to other coal, but the Department of Commerce informs us that, as a matter of law, this was not true during the period involved in this suit, and, indeed when the judgment of the trial court was entered. Moreover, respondent is in no position to demand equitable relief, since it resold the coal and its damages can be calculated from the terms of the resale contracts. In any event, the court of appeals plainly erred in holding, at the present stage of the litigation, that the coal is of such a "peculiar nature" as to warrant equitable relief, without giving the Government an opportunity to try that issue along with the others the court below directed to be tried.

## III

On the merits of the transaction, respondent's case is without support. The complaint (including exhibits) discloses that respondent breached the agreement by refusing to deposit \$17,500 in cash with the designated Dallas bank and by insisting on substituting payment by means of a letter-of-credit, which seriously disadvantaged the War Assets Administrator and did not comply with the contractual requirements. And, if it be material, it is likewise shown by the exhibits that under the conventional doctrines of sales law, title to the coal never passed to respondent. Title was not to pass before the coal was loaded on freight cars at Camp Maxey, as appears from the significant indicia of the parties' intention, *i. e.* insistence on cash payment at or before shipment; the inclusion of an f. o. b. shipping point term; and the distribution of risk so that the Government bore the risk until timely shipment and the purchaser thereafter. The use of the words "sale" or "contract of sale" in War Assets' standard Sales Memorandum follows normal, judicially recognized, use of those terms in a broad sense and does not indicate any intention that title was to pass immediately on consummation of the agreement.

## ARGUMENT

## I

THE COMPLAINT SHOULD BE DISMISSED AS MAINTAINING A SUIT AGAINST THE UNITED STATES TO WHICH IT HAS NOT CONSENTED

In the present climate of opinion, a plea by the Government to turn the respondent out of court for bringing an unconsented suit against the United States may initially seem distasteful. But in this case we have interposed and steadfastly maintained that defense because we believe it to be warranted by all the historically accepted rules and doctrines of sovereign immunity, sustained in this instance by the demands of the public interest, and confirmed by the general congressional legislation partially lifting the immunity bar. This is in essence a suit against a government official, in his official capacity, to compel specific performance of an ordinary sales agreement entered into by the United States. Such judicial compulsion on government officers to take affirmative action in the fields of government procurement and property disposal has consistently been denied by this Court, and for more than formal or historical reasons. And when Congress has permitted suits against the United States for demands arising out of the Government's procurement and distribution activity, as in the Tucker Act and the Federal Tort Claims Act, it has carefully limited its consent to actions for money dam-



ages. The field of government contractual relations is preeminently one, in our view, in which it is important that the bar of immunity be lifted no further than Congress has expressly authorized or this Court has traditionally sanctioned.

A. THE COMPLAINT ON ITS FACE DISCLOSES THAT RESPONDENT SEEKS SPECIFIC PERFORMANCE OF A CONTRACT WITH THE UNITED STATES

1. The history of this transaction, as revealed on the face of the complaint, shows that, in all but the defendant's name, the suit is one to compel specific performance by the United States of an agreement concerning the sale of certain government-owned coal to respondent.<sup>13</sup> The coal was admittedly the property, and in the possession, of the United States, which duly entered into a conventional contract for its disposition. Before removal of the coal from the Government's possession, a dispute arose as to respondent's compliance with the payment requirements

<sup>13</sup> In determining whether the suit is against the sovereign it is, of course, immaterial that the sovereign is not named as a party defendant. *Louisiana v. Jumel*, 107 U. S. 711; *Cunningham v. Macon & Brunswick R. R. Co.*, 409 U. S. 446; *Poindexter v. Greenhow*, 114 U. S. 270, 287; *Hagood v. Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 487-492; *Belknap v. Schild*, 161 U. S. 10, 25; *Minnesota v. Hitchcock*, 185 U. S. 373, 386; *Oregon v. Hitchcock*, 202 U. S. 60, 68-69; *Louisiana v. McAdoo*, 234 U. S. 627, 629; *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 296; *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371; *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459, 464.

of the contract, and the Government refused delivery on the ground that respondent, having failed to fulfill its contractual obligation to make a single cash deposit in a Dallas bank, thereby breached the agreement. Respondent naturally contended that it had fully performed its undertakings, while the Government, for its part, claimed that respondent was in default and was not entitled to delivery. Asserting that damages would afford an insufficient remedy, the respondent then brought this action against the head of the government agency charged with the disposition of the coal, naming him solely in his official capacities and not as a private person (R. 1, 2);<sup>14</sup> the complaint contained no allegation that the War Assets Administrator, the defendant, had any personal knowledge of the transaction, nor was it charged that either he or his subordinates were acting beyond the scope of their statutory or constitutional authority. As if it were suing a recalcitrant private vendor for specific performance, respondent sought an injunction against sale or delivery of the coal to any other person, and against "cancellation of the sale to the plain-

<sup>14</sup> The War Assets Administration is an administrative unit of the United States, like a cabinet department, established to carry out the functions delegated to it by Congress and the President; it is not a corporation nor is it a legal entity separate from the United States; Congress has made neither it nor the Administrator suable. Cf. *United States Department of Agriculture v. Remond*, 330 U. S. 539, 541-542; see *supra*, fn. 3, p. 4.

tiff of this coal," as well as a declaratory decree that "the sale of this coal to the plaintiff \* \* \* is still valid and in effect" and that "the purported sale to the Midland Coal Company is illegal" (R. 8-9). "An injunction against the breach of a contract is a negative decree of specific performance of the agreement" (*Shubert v. Woodward*, 167 Fed. 47, 53 (C. C. A. 8)),<sup>15</sup> and respondent's whole effort is plainly to compel the War Assets Administrator, as an official of the United States, to perform the United States' contract by officially ordering his subordinates to load the 10,000 tons of coal upon receipt of respondent's shipping orders,<sup>16</sup> and to accept pay-

<sup>15</sup> Cf. 5 Williston, *Contracts* (Rev. ed., 1937), Sec. 1445: "Injunction as a means of specific performance"; *In re Ayers*, 123 U. S. 443, 502-503 (equating a direct prayer for specific performance with a "bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract"); *Wells v. Roper*, 246 U. S. 335, 337 (treating a bill in equity for an injunction restraining the Postmaster General "from annulling a contract theretofore made between plaintiff and the Postmaster General acting for the United States, and from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff" as a forbidden suit "to oblige the United States to accept continued performance of plaintiff's contract").

<sup>16</sup> Respondent's complaint prayed (R. 9): "That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions."



ment to the United States as proffered by respondent.

2. The court of appeals should have dismissed this action, as did the district court, under the settled rule, consistently announced by this Court and the lower courts over at least the past sixty-five years, which denies to federal courts jurisdiction to entertain proceedings seeking an injunction or a writ of mandamus directing specific enforcement of a contract made by the sovereign, though the complaint nominally may be against an individual public official. This is one rule which undeniably emerges as firmly established from the unclear state of the authorities in the field of sovereign immunity.<sup>17</sup> *Louisiana v. Jumel*, 107 U. S. 711, 721; *Hagood v. Southern*, 117 U. S. 52, 68; *In re Ayers*, 123 U. S. 443, 502-504; *United States ex rel. Levey v. Stockslager*, 129 U. S. 470, 478; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10-11; *Belknap v. Schild*, 161 U. S. 10, 18; *Tindal v. Wesley*, 167 U. S. 204, 219; *Ex parte Young*, 209 U. S. 123, 151-152; *Hopkins v. Clemson College*, 221 U. S. 636, 642; *Goldberg v. Daniels*, 231 U. S. 218; *Wells v. Roper*, 246 U. S. 335; *Ex parte New York*, 256 U. S. 490, 500; *Goltra v. Weeks*, 271 U. S. 536, 546; *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371; *Land*

<sup>17</sup> Cf. *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451; *Brooks v. Dewar*, 313 U. S. 354, 359; *Land v. Dollar*, 330 U. S. 731, 738 (on the difficulty of reconciling this Court's decisions in this field).

v. *Dollar*, 330 U. S. 731, 737; *United States ex rel. Shoshone Irr. Dist. v. Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571; *Transcontinental & Western Air, Inc. v. Farley*, 71 F. 2d 288, 290-292 (C. C. A. 2); certiorari denied, 293 U. S. 603; *Boeing Air Transport v. Farley*, 75 F. 2d 765, 768 (App. D. C.), certiorari denied *sub nom. Pacific Air Transport v. Farley*, 294 U. S. 728; *International Trading Corp. v. Edison*, 109 F. 2d 825 (App. D. C.), certiorari denied, 310 U. S. 652; *O'Harra v. Littlejohn*, 69 F. Supp. 274, 276 (D. D. C.). By the Tucker Act and the Federal Tort Claims Act, the United States has provided a forum which can award money damages against the Government for breach of contract and for certain types of tort, but, as these cases hold, the United States has not yet permitted itself to be sued for specific performance.

3. The gist of the rule applying the bar of sovereign immunity to actions such as this, and the reasons for the Court's constant reaffirmation of the principle, were shortly put in *Ex parte Young*, 209 U. S. 123, 151, where, speaking of state contracts, this Court said: "The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State. \* \* \* A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which con-

stituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." Similarly, the Court said, twenty years earlier: " \* \* \* where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution." *In re Ayers*, 123 U. S. 443, 504. Cf. Note, 41 Col. L. Rev. 1236, 1241. It is obvious that, in the case at bar, respondent seeks to compel petitioner to do "the very things which when done would constitute a performance" of the contract by the United States, and to forbid him from "the doing of those things which, if done, would be merely breaches of the contract" by the United States. And the complaint even more nakedly reveals its character as a claim against the United States by praying flatly for a decree that "the sale of this coal to the plaintiff"—a "sale" by the United States, if by anyone—"is still valid and in effect." See, *infra*, pp. 55-56.



4. Another way of disclosing the sovereign as the real party in interest, in such suits for specific performance, is to note that in order to secure relief the plaintiff must of necessity endow the defendant with official character, as respondent implicitly recognizes in the caption of the present suit (R. 1, 2). The defending official cannot comply with the court's decree as an individual or private person; he must act as a government official and within the scope of his official duties. Here, for instance, Mr. Larson would be required, if respondent were ultimately successful, to order his subordinates not to deliver the coal to the Midland Coal Company but to load it on freight cars at Camp Maxey, Texas, in accordance with respondent's shipping instructions, and to accept payment by means of the letter-of-credit method respondent has proposed. These actions he could take only in his official capacity as War Assets Administrator. It has always been held conclusive proof that a suit is against the sovereign when it is clear that the agent who is the nominal defendant can only comply with the judgment or decree in his official capacity.<sup>18</sup> *Governor of Georgia v. Madrazo*, 1 Pet. 110, 123-124; *Louisiana v. Jumel*, 107 U. S. 711, 720; *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446,

<sup>18</sup> With the exception of suits for injunction or mandamus to compel the performance of purely ministerial acts, *e. g.* *Miguel v. McCarl*, 291 U. S. 442. We show below that this exception is inapplicable to the instant case. *Infra*, pp. 70-73.

453-454; *Hagood v. Southern*, 117 U. S. 52, 69; *In re Ayers*, 123 U. S. 443, 489; *New York Guaranty Company v. Steele*, 134 U. S. 230, 232; *Penoyer v. McConnaughy*, 140 U. S. 116; *Belknap v. Schild*, 161 U. S. 10, 25; *Smith v. Reeves*, 178 U. S. 436, 439; *Naganab v. Hitchcock*, 202 U. S. 473, 475; *Wells v. Roper*, 246 U. S. 335, 337; *Ex parte New York*, 256 U. S. 490, 501; *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 296; *Great Northern Ins. Co. v. Read*, 322 U. S. 47, 50; *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459, 463-464; *Haskins Bros. & Co. v. Morgenthau*, 85 F. 2d 677, 682-683 (App. D. C.), certiorari denied, 299 U. S. 588. The principle is analogous to that recently set forth in *Williams v. Fanning*, 332 U. S. 490, holding that a superior need not be joined in an action against his subordinate, where the judgment will expend itself on the subordinate alone and the superior will not be required to take new action, either directly or indirectly through his subordinate. Conversely, in an action such as this, the defending public official cannot satisfy the plaintiff as a private person but must take new action on behalf of, and as an agent of, the United States. The United States is therefore either the real party in interest or an indispensable party defendant, and since it has not consented to be brought to the bar the suit must fail.<sup>19</sup>

<sup>19</sup> In this connection, it is also significant that this is an equitable action and not one at law. For in *Cunningham v. Macon and Brunswick R. R. Co.*, 109 U. S. 446, the same

5. Respondent's answer to the argument that this is a forbidden suit for specific performance of a government contract appears to be three-fold: First, that the action cannot be considered a suit for specific performance because, in respondent's view, title to the coal has clearly passed (Br. in Opp., pp. 13-14); second, that the rule barring specific performance of government contracts applies only to contracts for continuing performance of "sovereign functions such as carrying the mail" (Br. in Opp., pp. 19-20); and, third, that where the suit involves property the title to which has allegedly passed to the plaintiff, the principles of *United States v. Lee*, 106 U. S. 196, and *Land v. Dollar*, 330 U. S. 731, apply. The last limb of this argument we discuss in the succeeding section of this brief; the first two we may appropriately analyze at this point.

a. Nothing in the general law of contracts or of equitable remedies limits a purchaser's privilege to sue for specific performance to those cases in which the vendor admittedly still retains title. Where it is otherwise available, the remedy of specific performance can be applied

on a bench which decided *United States v. Lee*, 106 U. S. 196, speaking exactly one year later through the same justice (Mr. Justice Miller), distinguished the *Lee* class of actions at-law on the ground, *inter alia*, that "Courts of equity proceed upon different principles in regard to parties," and that in equitable suits the sovereign, which undeniably has a real interest in the controversy, must be treated as an indispensable party, in "equity and good conscience." 109 U. S. at 456-7.



whether or not title has passed; it can be, and usually is, employed to compel *delivery of the property*, regardless of the incidence of title at the time the suit is commenced, and not merely to compel "the transfer of *title* as promised in the contract to sell," as respondent would have it (Br. in Opp., p. 13; *italics supplied*). The Uniform Sales Act plainly makes the remedy available in any proper case "where the seller has broken a contract to *deliver* specific or ascertained goods," without restriction (as is the case with respect to other remedies) to instances where the property in the goods has passed to the buyer.<sup>20</sup> The comparable provision of the English Sale of Goods Act has been judicially interpreted to apply to "all cases where the goods are specific or ascertained, whether the property has passed to the buyer or not." *In re Wait* [1927] 1 Ch. 606, 617; *James Jones & Sons, Ltd. v. Earl of Tankerville* [1909] 2 Ch. 404, 445. And this conclusion has been expressly affirmed

<sup>20</sup> Section 68 of the Uniform Sales Act (D. C. Code, sec. 28-1506) provides:

*Specific Performance.* Where the seller has broken a contract to deliver specific or ascertained goods, a court having the power of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just.

as to American law, upon the basis of a detailed study of the interrelations of specific performance and the Uniform Sales Act. Masterson, *Specific Performance of Contracts to Deliver Specific or Ascertained Goods under the English Sale of Goods Act and the American Sales Act*, in *Legal Essays in Tribute to Orrin Kip McMurray* (Radin ed., 1935), pp. 439, 460-461. See, also, to similar effect, American Law Institute, *Restatement of Contracts*, Sec. 358, especially comment i; 2 Williston, *Sales* (2d ed. 1924), Secs. 601-602; 5 Williston, *Contracts* (Rev. ed. 1937), Sec. 1419-1419A; Note: *Specific performance, or injunction against breach, of contract for sale of tangible personal property*, 152 A. L. R. 4, especially 41-44. Moreover, respondent's own complaint belies its argument that it cannot be seeking specific performance since it already has title; in terms applicable only to an equitable action for specific performance, the complaint details the items of asserted irreparable damage (R. 7-8) and concludes that "therefore the plaintiff has no adequate or complete remedy at law" (R. 8); again, the prayer distinctly asks for a decree that "the sale of this coal to the plaintiff \* \* \* is still valid and in effect" (R. 8) and for an *injunction* against the "carrying into effect the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal" (R. 8). See *supra*, p. 11. The court of appeals obviously treated the case as one for specific performance

since it held "the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief" (R. 58-59); and a substantial share of respondent's argument in this Court has thus far been directed to sustaining that holding (Br. in Opp., pp. 27-28).

As long ago as 1913, in a similar suit against a public official for the equivalent of specific performance of a government contract, this Court held allegations of title to be immaterial. In the now classic case of *Goldberg v. Daniels*, 231 U. S. 218, the private plaintiff claimed ownership of the vessel in himself,<sup>21</sup> while the government official pleaded title in the United States; but this Court, without determining the issue of title, held that the suit must fail as one against the United States.<sup>22</sup> See also, *infra*, p. 39.

<sup>21</sup> The petition for a writ of mandamus in *Goldberg v. Daniels*, *supra*, alleged (R. 4, No. 79, Oct. T. 1913): "13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser *Boston* to him."

<sup>22</sup> Respondent correctly states (Br. in Opp., pp. 16-17), that the Secretary of the Navy's answer to the plaintiff's petition (*supra*, fn. 21) averred title in the United States, and that the plaintiff demurred to the answer; but respondent is incorrect in concluding that on that state of the record the title was admittedly in the Government. In view of the detailed pleading of the facts and circumstances, the Secretary's allegation of title was a conclusion of law which the plaintiff's demurrer did not admit (*Newport News Co. v. Schauffler*, 303 U. S. 54, 57; *Nortz v. United States*, 294 U. S. 317, 324-325; *St. Louis, Kennett & Southeastern Ry. Co. v. United States*, 267 U. S. 346, 348-349), and the court had before it the then equivalent of motions, by both parties,



b. Of course, the bar against specific performance of government contracts applies to more than agreements involving "continuing sovereign functions such as carrying the mail." (Br. in Opp., p. 20.) *Goldberg v. Daniels*—which this Court cited only two terms ago as exemplifying the rule (*Land v. Dollar*, 330 U. S. 731, 737)—itself involved the sale of a single surplus naval vessel, and the principle has never once been stated or applied (see cases cited, *supra*, pp. 28-29) as narrowly as respondent contends. The two cases which respondent cites for this argument (*Wells v. Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc. v. Farley*, 71 F. 2d 288 (C. C. A. 2)) do not rest on any peculiar "sovereign" character of the functions there involved, as distinguished from other federal activities, nor do they limit the rule to a particular segment of governmental functioning. The immunity's historical scope is undeniably as broad as the Government's authority. The reasons of policy for continuing to classify suits for specific performance against public officials as suits against the sovereign we discuss below (*infra*, pp. 63-70),

for judgment on the pleadings; these motions rested on the underlined facts appearing in both petition and answer, rather than on the pleaders' differing conclusions. Cf. e. g. *Meyer v. Reif*, 217 Wis. 11, 12-13. The Court of Appeals for the District of Columbia resolved the issue of title in favor of the Government (*United States ex rel. Goldberg v. Meyer*, 37 App. D. C. 282) but this Court found it unnecessary to pass upon that question.

and they cover single sales of surplus property as well as continuing transactions. For the "essential nature and effect of the proceeding" in a case like this is such that the judgment sought by respondent would both "expend itself on the public \* \* \* domain," and "interfere with the public administration." *Land v. Dollar*, 330 U. S. 731, 738.

B. THE RULE OF *UNITED STATES V. LEE* AND *LAND V. DOLLAR*  
IS INAPPLICABLE

Respondent's main argument is that *United States v. Lee*, 106 U. S. 196, and *Land v. Dollar*, 330 U. S. 731, wholly govern this case. In its view, these decisions hold that whenever the plaintiff *claims* a property interest in specific property (realty or personalty) in the possession of government officials, and *asserts* that the property is being withheld tortiously by the defendant officials, the suit is not one against the United States, at least until it is finally decided, after trial, that the United States has full title to and right to possession of the property. Neither case, however, announces or applies such a broad principle, which would arbitrarily single out claimed rights in tangible property for specially favored treatment, at the same time putting an end to a large part of the traditional governmental immunity from suits for specific performance, *supra*, pp. 28-30. We believe, rather, that the rule of these two cases rests on a complex of elements, absent in the case of an ordinary sale of govern-

ment property and of the normal suit for specific performance of a public contract, such as this.

1. *Specific performance excepted.*—In the first place, *Land v. Dollar* expressly distinguished an “attempt to get specific performance of a contract to deliver property of the United States” (330 U. S. at 737), and the *Goldberg* case, which the Court cited, was held an unconsented suit despite the complainant’s express assertion of ownership of the property, which was the subject of the alleged contract. *Supra*, p. 36. It has thus been made plain by this Court that the rule of the *Lee* and *Land* cases is inapplicable to attempts to get specific performance of government contracts, and that a plaintiff’s assertion of ownership does not put the case within that rule.

2. *Officer exceeding authority.*—Secondly, it is settled that although an allegation that the officer is acting in excess of his statutory or constitutional authority may not be sufficient of itself to take the case beyond the immunity bar,<sup>23</sup> a sub-

<sup>23</sup>In the following decisions, for example, the courts have held the suit to be against the Government, although it was duly alleged that the officer’s conduct was without authority in the Constitution or statute. *Louisiana v. Jumel*, 107 U. S. 711, 720–723; *Hagood v. Southern*, 117 U. S. 52, 67–68; *Oregon v. Hitchcock*, 202 U. S. 60, 69–70; *Naganab v. Hitchcock*, 202 U. S. 473, 475; *Louisiana v. Garfield*, 211 U. S. 70, 77–78; *Louisiana v. McAdoo*, 234 U. S. 627, 632–634; *Lankford v. Platte Iron Works*, 235 U. S. 461, 476; *New Mexico v. Lane*, 243 U. S. 52, 58; *Morrison v. Work*, 266 U. S. 481, 485–488; *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371; *Boeing Air Transport, Inc. v. Farley*, 75 F. 2d 765 (App.



stantial claim to that effect is a *necessary* condition precedent to maintaining an action against the public official. "Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred."

*Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18, 21 (citing the *Lee* case, among others).

See also *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 297; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620. The reason for this requirement is inherent in the constitutional immunity of the sovereign from unconsented suits and the theoretical foundation for permitting certain suits against public officials. If the officer were plainly acting within his proper authority, all his actions would automatically be official, and there could not even be a theoretical or fictional claim that he was being sued as a private person or that the sovereign had no interest in the action.

See, *supra*, pp. 29-32, *infra*, pp. 47, 63.

¶ In both *Lee* and *Land* the plaintiffs categorically averred that the defendants had exceeded their legal authority. In the former, the Court stated the basic inquiry to be to examine whether the defending officers' authority was "rightfully as-

*D. C.*), certiorari denied, 294 U. S. 728; *Transcontinental & Western Air, Inc. v. Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.

sumed" and whether they were "lawfully possessed" of the authority they claimed (106 U. S. at 219). It was found that the Arlington estate was taken from plaintiff "by force and violence, and detained by the strong hand" (106 U. S. at 219), that the President and his subordinates had no lawful statutory or constitutional authority to take or hold the property (106 U. S. at 219-220), that the Secretary of War "had no more authority to make" the order by which the defendants justified their possession "than the humblest private citizen" (106 U. S. at 221), and that the plaintiff had been invalidly deprived of his property without due process of law (106 U. S. at 220-221).<sup>24</sup> Likewise, in the *Land* case, the plaintiffs alleged that the defendants were exceeding their statutory authority (330 U. S. at 734),<sup>25</sup> and the Court ac-

<sup>24</sup> The decisions which followed the *Lee* case similarly rest on findings or substantial allegations that the public official exceeded his valid authority:—*Tindal v. Wesley*, 167 U. S. 204, 222; *Scranton v. Wheeler*, 179 U. S. 141, 152; *Poindexter v. Greenhow*, 114 U. S. 270, 287-288; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620; *Goltra v. Weeks*, 271 U. S. 536, 544-546; *Ickes v. Fox*, 300 U. S. 82, 96-97; see *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18, 21. These are all cases of alleged illegal tortious interference with the plaintiff's established property rights. See also *infra*, pp. 46, 54.

<sup>25</sup> The complaint alleged that "the contract between the plaintiffs and the United States Maritime Commission was unauthorized and prohibited by express provisions of the Merchant Marine Act of 1936, as amended," and that the defendants were "acting not only in excess of the powers validly conferred under the provisions of the Merchant Marine Act of 1936, as amended, but by actions which directly contravene the provisions of said Act" (R. 6, 7, No. 207, Oct. T. 1946).

cepted these allegations until they should be disproved at a trial. On the complaint, therefore, the defendants were "unlawfully" withholding the plaintiffs' shares (330 U. S. at 737), and could be said to have "become tort-feasors by exceeding the limits of their authority" (330 U. S. at 738); and the shares were "being wrongfully withheld by petitioners who acted in excess of their authority as public officers," (330 U. S. at 738).<sup>26</sup>

In the present case, on the other hand, the complaint nowhere alleges that petitioner's predecessor as War Assets Administrator stepped outside of his statutory or constitutional powers. The court of appeals does intimate (R. 58), however, that on respondent's version of the transaction, General Littlejohn (and presumably petitioner) exceeded his authority by refusing to require delivery of the coal. But we think that by this time it is settled that government contracting officials do not normally exceed their authority when they misconstrue the terms of an agreement and thus cause an actionable breach by the United States. Like any private corporation or large business enterprise, the Government must of necessity act through agents in making contracts; and the Government has the same right as a private business to entrust its agents with discretion and authority, so far as the principal is concerned, to

<sup>26</sup> In discussing the *Lee* opinion, the Court also stressed the invalidity of the authority of the defending public officials in that case. 330 U. S. at 736.



act upon disputed questions of contract interpretation. Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 127-132. Here, the War Assets Administration, as the proper agency to dispose of the coal, was fully and specifically authorized by the Surplus Property Act to "dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper" and to "execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property \* \* \*." *Supra*, p. 3. This plenary grant of power indicates that the Administrator's official authority respecting disposal contracts was not limited to a correct interpretation of the contractual terms; even when he erroneously construes a particular agreement and orders his subordinates to withhold surplus property in accordance with that misconstruction, he acts within the scope of his lawful authority as War Assets Administrator, exactly as does the president of a mail-order house when he refuses delivery of goods under a misinterpretation of the sales agreement. The refusal to deliver the coal was thus an authorized act; though it may have resulted in a breach by the United States of the sales contract for which the United States, the seller, might be held liable in the Court of Claims.

Cf. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, (1946) 59 Harv. L. Rev. 1060, 1075, quoted *infra*, p. 65.

*Wells v. Roper*, 246 U. S. 335, is square authority that a government official misconstruing a government contract does not thereby normally exceed his powers, and that the injured plaintiff must find his remedy in a suit against the other party to the contract, the United States. The Postmaster General decided to institute a new government-operated mail collection and delivery service and cancelled plaintiff's contract for the furnishing of automobiles and chauffeurs for use in mail collection and delivery, purporting to act under the cancellation clause of the contract. The plaintiff, regarding the cancellation clause as inapplicable, brought suit against the First Assistant Postmaster General for an injunction restraining the cancellation of the contract and "from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff" (246 U. S. at 335). In dismissing the suit as one against the United States, the Court pointed out (p. 337) that "the effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract \* \* \*," and added (pp. 337-338): •

\* \* \* The argument to the contrary assumes to treat defendant not as an official but as an individual who although

happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. \* \* \* It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. *And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.* \* \* \*

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. \* \* \* [Italics supplied.] <sup>27</sup>

<sup>27</sup> Similarly, a public official does not normally exceed his general authority when he commits a *tort* injurious to a private citizen's personal or property rights. Cf. *Ex parte New York*, 256 U. S. 490, 502 (damages caused by tugs operated by the State of New York); Federal Tort Claims Act, Sec. 410, 60 Stat. 842, 842-843, 28 U. S. C. 931 ("negligent or



3. *Private common-law tort*.—Another element, essential to the decision in *Lee* and *Land* but missing here, is the existence of private common-law tortious action by the defendant, if respondent's complaint be accepted on its face. The earlier case was an action of ejectment to secure the ouster of two individual trespassers who obtained possession of the property "by force and violence, and detained [it] by the strong hand" (106 U. S. at 219); and the relief prayed for, ejectment, could be granted if the defendants were regarded solely as private individuals. Cf. on the *Lee* case as a suit for a personal tort, *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *In re Ayers*, 123 U. S. 443, 501-502; *Stanley v. Schwalby*, 147 U. S. 508, 518, 162 U. S. 255, 271-272.<sup>28</sup> In *Land*, the plaintiffs specifically alleged tortious invasion of their rights (R. 7, No. 207, Oct. 1, 1946), and the Court held their claim as pledgors to sound in tort and deemed the suit as one against private tort-feasors (330 U. S. at 736, 738).

wrongful act or omission of any employees of the Government while acting within the scope of his office or employment (\* \* \*).

<sup>28</sup> The later cases in the *Lee* line also involved tort actions: *Poindexter v. Greenhow*, 114 U. S. 270 (detinue for personal property alleged to be improperly distrained by defendant for delinquent taxes); *Tindal v. Wesley*, 167 U. S. 204 (ejectment); *Scranton v. Wheeler*, 179 U. S. 141, 152 (ejectment); *Philadelphia Co. v. Stimson*, 223 U. S. 605 (injunction to prevent trespass); *Galtra v. Weeks*, 271 U. S. 536 (same); *Ickes v. Fox*, 300 U. S. 82 (same).

Neither petitioner nor his predecessor can properly be sued as tort-feasors, regardless of their authority<sup>29</sup> and whatever the merits of respondent's claim to the coal. There has certainly been no personal misconduct on the part of either official; the complaint does not even allege or suggest that the original defendant, General Littlejohn, had any knowledge of the transaction prior to the filing of the complaint. Nor does the complaint appear to aver that either the United States or other officers of the War Assets Administration acted tortiously in invasion of respondent's rights.<sup>30</sup> But if, a conversion of property did occur, as respondent now seems to argue (Br. in Opp., p. 19), the tort-feasor was the United States, the seller, and not petitioner or his predecessor who were the seller's principal officers. Cf. *Goldberg v. Daniels*, 231 U. S. 218. And if the subordinate officials who actually participated in the transaction are thought to be guilty of conversion,<sup>31</sup> it has been settled for a hundred years that

<sup>29</sup> Once it is admitted, as we think it must be, that petitioner and his predecessor have not exceeded their valid authority (*supra*, pp. 42-43), we think it is clear that *ipso facto* they cannot be sued as private tort-feasors.

<sup>30</sup> The complaint does no more than allege that "the officers of War Assets are acting illegally in purporting to sell coal to a third party which is the property of plaintiff" (R. 7). This allegation is entirely consistent with a purely contractual action without delictual overtones.

<sup>31</sup> There are at least three separate reasons for asserting that these subordinate officers and employees would not themselves be personally guilty of conversion even if respondent's contentions as to passage of title were wholly cor-

their superior (the War Assets Administrator) does not thereby become a tort-feasor and cannot be held liable for their wrongs. "A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties."

*Robertson v. Sichel*, 127 U. S. 507, 515-516; see also *German Bank v. United States*, 148 U. S. 573, 579-580; *Malewicki v. Qvale*, 298 Fed. 301 (C. C. A. 8); *Zinkhan v. District of Columbia*, 271 Fed.

rect. In the first place, they were acting within the scope of their authority and all their acts were therefore official (*supra*, pp. 42-45). Secondly, under the law of conversion, "failure to deliver what one has no power to deliver may be a breach of contract, but it is not a conversion" [Warren, *Trover and Conversion* (1936), pp. 37-44], and these officials would certainly have no power, as private individuals, to order the loading and delivery of the coal to respondent (see *supra*, pp. 31-32 and *infra*, pp. 50-51). Thirdly, a servant or employee should not be held liable as a converter for accepting his employer's claim of title and following his employer's directions to withhold possession; Professor Warren (*Trover and Conversion*, pp. 48-49) says that "this is a point not yet clear upon the authorities," but he is of the view that the better rule exonerates the servant or employee, following the old case of *Mires v. Solebay*, 2 Mod. 242, 244, 86 Eng. Reprints 1050, 1051; cf. *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18. Thus, if the seller here were a private corporation or business, it could be held liable for conversion if respondent were right, but not its employees who merely upheld its title; by like token, the United States might be a tort-feasor, but not its officers or employees in the War Assets Administration.

These reasons also apply; we might note, in the instance of Mr. Larson and General Littlejohn.



542 (App. D. C.); *Jones v. Kennedy*, 121 F. 2d 40, 44 (App. D. C.).<sup>32</sup>

Furthermore, even if General Littlejohn, as War Assets Administrator at the time respondent's alleged cause of action arose, could be held to have committed a conversion of the coal, the present petitioner does not stand in the same shoes. In actions to recover real property, as the *Lee* case, any defendant in possession may be regarded as a current trespasser; but as to personalty, there is only one trespass, the initial taking. When the property is turned over to another official, such as a successor in office, the latter's possession of, and interest in, the property can occur only by virtue of his official capacity. Cf. *Governor of Georgia v. Madrazo*, 1 Pet. 110.<sup>33</sup>

<sup>32</sup> If respondent seeks to charge the War Assets Administrator with a tortious interference with its contract rights, *Wells v. Roper*, 246 U. S. 335, which involved a like charge, sufficiently shows that an accusation of this character cannot operate to remove the immunity bar. In addition, it is a general rule of tort law that an officer, agent, or employee of a contracting party, absent bad faith, cannot be held liable by the other contracting party for inducing or causing his employer or principal to breach the contract. *Greyhound Corp. v. Commercial Casualty Ins. Co.*, 259 App. Div. 317, 19 N. Y. Supp. (2d) 239 (1st Dept.), and cases cited.

<sup>33</sup> It is true that in *Osborn v. United States Bank*, 9 Wheat. 738, the Court gave judgment for possession of illegally collected tax monies against the treasurer of the state and his successor; but, in this aspect, the case has been restricted to the ground that the monies were originally turned over to the treasurer in violation of an order of injunction, so that the decree of restoration corrected the violation of the injunction. *Cunningham v. Macon & Brunswick R. R. Co.*,

He is not responsible for torts that his predecessor may have committed.

Finally, the error in characterizing the instant action, unlike the *Lee* and *Land* suits, as a private tort action against an official "stripped of his official character" by a wrongful invasion of the plaintiff's rights, is shown even more clearly by the type of relief which respondent requires. In *Lee*, the plaintiff could be entirely satisfied by personal eviction of the defendant officers from his land; in *Land*, as the Court held, the plaintiff's relief would merely compel the officials to hand over the documents representing the shares of stock in their possession. In both cases, the Court assumed the defendants could comply with the court's judgments as private individuals. In the present action, however, petitioner could only satisfy respondent by taking official action, *i. e.* by ordering his subordinates to load the 10,000 tons of coal in accordance with respondent's shipping instructions and to accept tender of payment in the form offered by respondent.<sup>34</sup> *Supra*, pp. 31-32.

109 U. S. 446, 455. Because of the injunction, the monies were regarded as, in law, "kept out of the treasury." *Louisiana v. Jumel*, 107 U. S. 711, 725. Cf. *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 16.

<sup>34</sup> Even if this were a proper private action to enjoin an admitted private tort-feasor, it is highly doubtful that, as part of its relief in such action, the plaintiff could, without converting the suit into one for specific performance, require the defendant to undertake the burden of loading the 10,000 tons of coal as directed. Cf. *Farrar v. Rollins*, 37 Vt. 295; Prosser, *Handbook of the Law of Torts* (1941), p. 106

This is action he can take only as War Assets Administrator; as Mr. Jess Larson, private citizen, he could have no right to issue such orders and the employees of the War Assets Administration would not be privileged to obey them. The fiction that the official is being sued as a private tort-feasor must therefore collapse whenever, as here, the complainant demands something more than withdrawal from his property, and seeks to compel continuing affirmative action by a government agency.<sup>35</sup>

4. *Pre-existing substantial property interest.*—Still another fundamental component of the *Lee-Land* rule is the fact that, on the plaintiff's allegations, the property in question never belonged to the United States, and the plaintiff had both an established substantial interest in the property and possession of it before the United States acquired its asserted right. George Lee's claim of title to the Arlington estate was rooted in the early nineteenth century; his family had "long possession under that title" (106 U. S. at 199); and the place was admittedly his old "homestead" (106 U. S. at 219), which had been acquired during the Civil War by the United States at a tax sale. Petitioners in *Land v. Dollar* owned the common stock of Dollar of

<sup>35</sup> Compare the related argument, *supra*, pp. 31-32, that a suit is clearly one against the sovereign when the plaintiff must endow the defendant with official capacity in order to secure relief. See especially *Pennoyer v. McConnaughy*, 140 U. S. 1, 16-17, and *Wells v. Roper*, 246 U. S. 335.



Delaware, an important American steamship line, for years prior to 1938, and their claim was that the stock "had only been pledged as collateral for a debt which had been paid" (330 U. S. at 734). If the allegations of the complaint were true, "the shares of stock never were property of the United States and are being wrongfully withheld by petitioners \* \* \*" (330 U. S. at 738).

Few words suffice to note the wide gulf between the circumstances of these two cases and the present claim, at its most favorable aspect. The United States owned and possessed certain surplus coal which it desired to sell, as part of its general program of disposal of war surplus. Respondent entered into a conventional agreement for the purchase of this coal, to which the Government admittedly had title immediately prior to the sales agreement, and which has continued in the Government's possession. As respondent reads the sales agreement, proper offer of payment was made to the Government and title to the coal has now passed under the applicable doctrines of the law of sales, but the Government, which is of the opposite view, refuses delivery and retains possession. "The dominant interest of the sovereign" may well be "on the side of the victim"—like Lee or Dollar—whose own goods or realty, in the actual and not merely formal sense, have been unlawfully held or seized by public officials. Cf. *Land v. Dollar*, 330 U. S. at 738. But we think

that no such interest can weigh in the scales of a purchaser who has no more than technical and formal title to goods which he does not now have and has never possessed. Cf. *Goldberg v. Daniels*, 231 U. S. 218. Where the transaction is a normal sales arrangement, it is hard to see how the application of the immunity bar can properly turn upon the "purely conceptual notion" of "passage of title" (L. Hand, J., dissenting, in *In re Lakes' Laundry*, 79 F.2d 326, 328 (C. C. A. 2)), thus presenting a forum for full determination of his claim to a purchaser who can use or misuse the nebulous and technical title doctrines of the law of sales to aver title in himself, while denying a trial and potential relief to the vendee whose agreement undeniably retains title in the sovereign.<sup>36</sup> Justice

<sup>36</sup> Professor K. N. Llewellyn, and others, have pointed out (1) the inadequacy and question-begging character of decisions adjudicating specific issues (*e. g.* who bears the risk at a particular time, whether seller can sue for the full price, etc.) on the basis of general determinations of the "location" of "title" in buyer or seller; (2) the inconsistency, confusion, and inadequacy of the rules purporting to aid such general determinations of the location of title, and of many decisions purporting to be based on those rules; and (3) the necessity of deciding the narrow issues actually presented for decision on the basis of relevant policy factors and in the light of the real factual setting. Cf. Llewellyn, *Cases and Materials on the Law of Sales* (1930), pp. 562-574; Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. Rev. 159, 165-175 ("The quarrel thus is, first, with the use of Title for purposes of decision as if the location of Title were determinable with certainty; and second, with the insistence on reaching for a single lump to solve all or most of the prob-

may require an opportunity to recover important property formerly possessed and enjoyed, which is now improperly withheld from the claimant by a government officer.<sup>37</sup> But neither justice nor

lems between seller and buyer—and even in regard to third parties”; p. 166, italics in original); Llewellyn, *Across Sales on Horseback* (1939) 52 Harv. L. Rev. 725, 731-3, 736.

Here, respondent urges “title” as its sole key to a full trial and decision on the merits; but the policy considerations pertinent to the issue of sovereign immunity (see *infra*, pp. 63-70) are wholly different from those normally operative in private buyer-seller cases, and a determination that for certain buyer-seller purposes a buyer had “title” in the circumstances of this case should not be decisive of the separate issues involved in the defense of sovereign immunity. For that purpose, as we state above, the only question relevant to respondent’s property interest is not technical title *vel non*, but whether respondent’s interests are of “sufficient substance” to override the policies inherent in the sovereign immunity bar. Cf. *Standard Oil Co. v. Clark*, 163 F. 2d 917, 929-930 (C. C. A. 2), certiorari denied, 333 U. S. 873.

<sup>37</sup> In *Poindexter v. Greenhow*, 114 U. S. 270, 295 (detinue for desk distrained by defendant for allegedly delinquent taxes), the Court said: “Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded.” In the other cases similar to *Lee* and *Land* (*supra*, fn. 24, p. 41; fn. 28, p. 46), the claimant was also in possession and enjoyment of property at the time his rights were invaded or threatened by the public official. Indeed, in *Philadelphia Co. v. Stimson*, 223 U. S. 605, which involved allegedly illegal regulatory activities of the Federal Government, there was no claim at all by the United States to the property; and in *Ickes v. Fox*, 300 U. S. 82, the plaintiffs admittedly owned and had long possessed the land to which the disputed water-rights were appurtenant, and had also long enjoyed the use of the water which the Government was seeking to cut off by alleged illegal and tortious actions.



history demand a like opportunity, in the absence of consent, to secure possession and use of government surplus property sold by the Government but undelivered for reasons deemed adequate by the surplus property officials.

5. *Government's rights unaffected.*—A final significant difference is that an adverse decision in the *Lee* and *Land* cases would not bind the United States or finally determine title to the property, while a victory for respondent would necessarily have those effects. An essential support of the two holdings on which respondent relies was the recognition, stressed by the Court, that the suit was for possession only (106 U. S. at 210, 219; 330 U. S. at 736-737, 739), and that the interest of the United States in the title could in no way be bound or affected by the judgment (106 U. S. at 217, 226; 330 U. S. at 736-737; 739). Where the plaintiff's chosen form of action against public officials did put in issue the sovereign's title, the Court unanimously held the suit to be "directly against the United States and against their property, and not merely against their officers." *Stanley v. Schwalby*, 162 U. S. 255, 271-272 (action of trespass to try title).<sup>38</sup>

<sup>38</sup> Cf. *Cunningham v. Macon and Brunswick R. R. Co.*, 109 U. S. 446, 456-7 in which Mr. Justice Miller pointed out, for the Court, that in equitable suits, as distinguished from actions at law such as the *Lee* case, a sovereign with a substantial interest in the controversy would be an indispensable party. See *supra*, pp. 32-33, fn. 19.

Respondent's complaint does more than demand possession of the coal from petitioner; it prays for an injunction against the "carrying into effect [of] the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal" (R. 8), and for declarations (1) that "the sale of this coal to the plaintiff by letter of War Assets Administration, dated March 19, 1947, is still valid and in effect" (R. 8), and (2) "that the purported sale to the Midland Coal Company is illegal, because title to this coal is in the plaintiff" (R. 9). These prayers necessarily require direct determination of the status and meaning of the Government's contract with plaintiff, and a choice between the United States and respondent as present owner of the coal. And these determinations of the Government's interest are not to be made solely as intermediate steps in a judgment on respondent's right of possession as against petitioner, but as final decrees declaring and adjudging the rights of the United States. This is precisely what respondent cannot do without impleading the United States in the proper forum.<sup>39</sup>

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<sup>39</sup> In *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371, 374-375, the Court's pertinent answer to a plaintiff who, like respondent, asserted that it had directed its action solely against the individual public official was as follows:

\* \* \* The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money law-

To sum up the reasons why the *Lee* and *Land* doctrine is inapplicable to the normal disposition of government property through conventional sales agreements: That rule expressly does not apply to an "attempt to get specific performance of a contract to deliver property of the United States"; moreover, it requires *first*, a substantial claim that the public official has exceeded his statutory or constitutional authority; *second*, a cause of action indicating that, if the respondent's factual allegations are true, the defending official has committed a private tort invading the plaintiff's rights, for which the plaintiff can secure the relief he demands without invoking the defendant's official capacity; *third*, a substantial

fully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. \* \* \*

And a prayer for a declaratory judgment, asking only that the Renegotiation Act be held unconstitutional, was expressly adduced as showing that the purpose of the suit was to have that Act, which concerned government contracts, declared unconstitutional, 326 U. S. at 375, fn. 4.



claim to a real (and not a formal) interest in the property, and actual enjoyment of it, antedating the transaction or events by which the plaintiff's rights were allegedly invaded; and *fourth*, the form of action, as well as the relief requested, must not require a determination of the rights, title, or interest of the sovereign, as distinguished from the individual defendant. We believe we have shown that on *each* of these counts the respondent's complaint fails to fall within the *Lee-Land* exception to the sovereign immunity doctrine: (1) The action is plainly one for specific performance, (*supra*, pp. 25-38); (2) neither petitioner nor his predecessor has breached his statutory or constitutional powers, and the complaint does not even allege that they have done so; (3) respondent does not, and cannot, charge General Littlejohn or petitioner with committing a private individual tort, and the relief sought necessarily requires official action; (4) the coal has long been the Government's and respondent, which has never possessed the property, can only claim, at best, under the technical sales law doctrines of passage of title; and (5) respondent's complaint plainly seeks a direct declaration as to the validity, status, and meaning of a government contract and a determination of the Government's title to the coal. Certainly, respondent can-

not show compliance, as it must, with *all* the requirements of the *Lee-Land* authorities.

C. THE SUIT IS ONE TO TRY TITLE TO AND RIGHT TO POSSESSION OF PROPERTY TO WHICH THE UNITED STATES ASSERTS FULL CLAIM

We have pointed out that the complaint reveals this suit to be one to compel specific performance of a government contract concerning the sale of government-owned coal. *Supra*, pp. 25-38. Since the subject of the contract is property which the United States claims as its own, an alternative way to view the action is as one to try the title to and right to possession of this property.

1. Except perhaps for cases which can be brought within the *Lee* rule, *supra*, pp. 38-59, a suit directly involving the use, possession, or title of property in which the Government claims an interest is a suit against the sovereign. *Carr v. United States*, 98 U. S. 433, 437-438; *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S. 233; *Belknap v. Schild*, 161 U. S. 10; *Stanley v. Schwalby*, 162 U. S. 255, 270, 272; *Minnesota v. Hitchcock*, 185 U. S. 373, 386-387; *Oregon v. Hitchcock*, 202 U. S. 60, 69-70; *Nagavab v. Hitchcock*, 202 U. S. 473, 475-476; *Louisiana v. Garfield*, 211 U. S. 70, 77-78; *Hopkins v. Clemson College*, 221 U. S. 636, 648-649; *Goldberg v. Daniels*, 231 U. S. 218; *Lankford v. Platte Iron Works*, 235 U. S. 461; *New Mexico v. Lane*, 243

U. S. 52, 58; *Morrison v. Work*, 266 U. S. 481, 485-486; *Leather v. White*, 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7); *Cummings v. Deutsche Bank*, 300 U. S. 115, 118; *Minnesota v. United States*, 305 U. S. 382, 386.

This rule is applicable not only where the United States' title or possessory right is conceded, but in every case where its claim is not merely colorable. *Louisiana v. Garfield*, *supra*; *Morrison v. Work*, *supra*; *Stanley v. Schwalby*, *supra*; *Oregon v. Hitchcock*, *supra*; *Nagamb v. Hitchcock*, *supra*; *Goldberg v. Daniels*, *supra*; *New Mexico v. Lane*, *supra*; *Leather v. White*, *supra*. In the *Garfield* case, the state filed a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title to certain lands claimed under the swampland acts. In response to a demurrer, lodged on the ground that the suit was against the United States, Louisiana argued (211 U. S. at 72-73);

According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain congressional statute of limitation and repose the title so conveyed is no longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present,



prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

In dismissing the bill for want of jurisdiction, the Court refused to let jurisdiction depend upon the complainant's allegations of title. Mr. Justice Holmes, for the Court, first assumed "for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit" (211 U. S. at 75). He then briefly reviewed the state's arguments that it had good title to the land, stated that at least the case was doubtful, and concluded:

But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. (211 U. S. at 77).

Thus, it was definitely held that although on the theory and allegations of the bill the United States had no interest, nevertheless the United States' claim was at least substantial and the suit would have to fail at its very outset. The same ruling was rendered in *New Mexico v. Lane*, *supra*, at 58, where the state asserted full title to certain lands formerly part of the public domain, and the United States controverted that claim. In the *Stanley* case, *supra*, where the private plaintiffs and the defending officials engaged in a spirited

dispute as to title to the land, the Court first held, without determining the merits, that the suit was against the United States and its property, and then "with a view to the ultimate determination of the case" (162 U. S. at 272), it upheld the Government's claim on the merits. See, also, *Morrison v. Work, supra*; *Goldberg v. Daniels, supra*.<sup>40</sup>

The present case involves a dispute as to title to and possession of coal at Camp Maxey, Texas. Both respondent and the United States claim title and the right to possession, and the Government's claim is at least substantial and not merely colorable. See Point III, *infra*, pp. 79-94. The controversy thus "raises questions of law and of fact upon which the United States would have to be heard," and its liability "cannot be tried behind its back." *Louisiana v. Garfield*, 211 U. S. 70, 77, 78.

<sup>40</sup> In the *Morrison* case, the Court dismissed a suit to enjoin the Secretary of the Interior from carrying out certain acts of Congress upon the ground that they unconstitutionally deprived the plaintiff and other members of the Indian tribe of property held by the United States for them as individuals. It was admitted that the acts were valid as to tribal property, which the United States claimed the property to be. The Court said that the claim of the United States that the property was tribal was at least a substantial one; that interference with its disposition of the lands by enjoining its officials would interfere with the performance of governmental functions, and vitally affect interests of the United States, and that hence the United States was an indispensable party (266 U. S. at 485-486).

For discussion of *Goldberg v. Daniels*, which is also pertinent to this point, see *supra*, pp. 36, 39.

2. The principle that a substantial governmental claim to the property is an initial barrier to any suit for title or possession may not apply when the *Lee* doctrine properly fits the case. We have shown, however, that respondent's complaint does not come within that class. *Supra*, pp. 38-59. For this phase of our argument, we may even go further and concede that the principle we urge immediately above is inapplicable to certain cases which do not squarely fit all the requirements of the *Lee-Land* rule, as we read it. But we think that one indispensable prerequisite of any suit against a public official testing the title or possession of government-claimed property is that the defendant official be fairly charged with exceeding his valid authority. That is the irreducible minimum of all the cases permitting such suits against an official. See *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18, 21; and *supra*, pp. 39-40, 47. There is no escaping the basic principle that when an officer acts within his powers all that he does is official and Government-oriented. Here, as we have already shown, respondent does not, and cannot properly charge petitioner or his predecessor with any action beyond his statutory or constitutional authority. *Supra*, pp. 42-45.

IN THE JUDGMENT SOUGHT BY RESPONDENT WOULD EXPEND ITSELF ON THE PUBLIC DOMAIN AND INTERFERE WITH THE PUBLIC ADMINISTRATION

Thus far, our argument has been mainly concerned with the traditional conceptions and doc-



trines, as well as the authoritative decisions, in that murky zone which is sovereign immunity. We have tried to show that this case is governed by established principles at the solid center and not by disputed rules at the periphery. It is our belief that the court of appeals' decision silently denies these long-settled principles, and casts away an important segment, hitherto unquestioned, of the historically accepted doctrines. But we do not rest solely on precedent, or history, or established principles. Threading our argument have been governmental considerations which we should now like to draw together.

1. Sovereign immunity does not stand in high repute with many jurists and lawyers, but the conception is imbedded in the Constitution and continues to be largely accepted by Congress and the state legislatures which have power to abolish the privilege, and therefore it must still be given its due place. It can have no more justified application than in the field of normal government contractual relations. For there the private party is a voluntary participant in a consensual transaction, which is generally commercial in character, and at the outset he knows both that he is dealing with the privileged Government,<sup>41</sup> and that Congress has limited his remedies to a suit for money damages under the Tucker Act. He is therefore

<sup>41</sup> Cf. *Rock Island, Arkansas & Louisiana R. R. Co. v. United States*, 254 U. S. 141, 143; *Federal Crop Insurance Corporation v. Merrill*, 332 U. S. 380.

not without some remedy, and as a voluntary actor cannot rightly complain that other remedies, available against private contractors, are not open. Nor in these cases do there exist the coercive elements—abuse of governmental regulatory power, abrupt seizure of truly private property, actual “invasion” of substantial rights—which, under our theory of government, suggest that the suit may justly be regarded as one against the officer as an individual.<sup>42</sup>

Respondent forgets that it freely entered into this transaction with the United States, fully aware of the status of its opposite number. It seeks to envelop the case with the aura of *in invitum* interference with substantial property rights which characterized *United States v. Lee* and was alleged to exist in *Land v. Dollar*. But the sole property right it can claim is the alleged

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<sup>42</sup> Cf. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine* (1946), 59 Harv. L. Rev. 1060, 1075:

On the other hand, when the breach of contract is not occasioned by such conduct [i. e. “official action pursuant to an unconstitutional statute or in excess of statutory authority”], but arises, for example, from a discretionary act of the official or from a difference of opinion as to the interpretation of the terms of the contract, then the underlying policy of the sovereign immunity doctrine to prevent undue interference with the operations of government should be afforded full protection and the suit barred for lack of jurisdiction. In this latter type of case, unlike the former situation, the plaintiff has no interest which outweighs the reason for applying the sovereign immunity doctrine.

technical title stemming from its contract, and, as we have already suggested, (*supra*, pp. 52-55), this type of formal property interest should not be a sufficient lever to move the case from the consensual-commercial domain, in which the Tucker Act alone controls, to the coercive area in which the private party may fairly be viewed as the victim of a wrongful invasion of his rights of property. Cf. *Land v. Dollar*, 330 U. S. at 738. If respondent is to have the opportunity to secure specific performance of its government contract, simply because that agreement concerns a disposition of government property and thus permits an allegation of passage-of-title, while contractors with other types of agreements continue to be barred by the established immunity rule, an additional remedy will be created for one class of public contractors which will be without warrant in the realities of government contracting. In the area of government procurement and distribution, traditional doctrines should not be discarded to make such an eccentric exception.

2. For the Government, maintenance of the immunity bar in cases arising from contractual transactions serves important practical ends. In *Land*, the Court referred to the "practical considerations reflected in the policy which forbids suits against the sovereign without its consent" (330 U. S. at 738), and there, as well as in *Williams v. Fanning*, 332 U. S. 490, the opinion



laid down a general practical test which would designate this suit as one against the United States. The "essential nature and effect of the proceeding" are such that the judgment sought by respondent would both "expend itself on the public \* \* \* domain," and "interfere with the public administration." 330 U. S. at 738. Coal forming part of the United States' surplus stores, and in its custody, would be abruptly transferred out of its hands by court order, and government officials would be required to load and deliver the coal to respondent's order. Under the decision below, disposal of such government surplus can be, and in this case has been, stopped completely by temporary restraining orders or injunctions, and to that extent the aim of the Surplus Property Act of 1944 (Sec. 2 (m), 50 U. S. C., App. 1611 (m) (r)) to foster speedy disposition of these assets is frustrated.<sup>43</sup> And the only protection afforded the United States has been an injunction bond of \$1,000 (R. 50) (see *supra*, fn. 11, p. 13), which will obviously be inadequate to permit recoupment of damages suffered, if the Government should finally prevail.

If the court of appeals' holding were to be applied to purchase and other non-sales cases, in

<sup>43</sup> Even if restraining orders, injunctions, or stays are not issued, the mere pendency of the action may well prevent disposition of the property to the prejudice of efficient administration. Cf. *Jones v. Securities & Exchange Comm.*, 298 U. S. 1, 17-18.

which the ingenuity of contractor's counsel can find reason for alleging a property interest," the result will be similar prolonged interference with the administration of government property which would be even more serious. Such affirmative judicial intervention in governmental affairs runs counter to the repeated admonition that "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief \* \* \*." *Decatur v. Paulding*, 14 Pet. 497, 516; *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 131-2. In the field of sovereign immunity, that basic principle operates to compel the designation of an action for a judgment which would interfere with the public administration as a barred suit against the Government.

Moreover, the substitution of this type of injunctive proceeding for a statutory action under the Tucker Act deprives the United States of the latter's time and procedural provisions, with substantial detriment to the conduct of the Government's contract litigation. The schedule in the

"*E. g.*, purchases by the United States in which delivery substantially precedes payment, as it usually does, and the private seller claims a property interest in the goods until final payment.

It is also pertinent to note that recent district court cases have sought to compel delivery to private parties of government property by alleging lesser property interests than full "title," *e. g.* *Palmer Bolt & Nut Co., Inc. v. Littlejohn*, 75 Wash. L. Rep. 725 (D. D. C.) ("equitable property interest and lien").

instant case will serve as an illustration. The contract for the sale of the coal was cancelled on April 16, 1947 (R. 5, 29). Yet by April 29, 1947, before the Department of Justice was apprised of a controversy, an *ex parte* restraining order had been obtained (R. 35-36), and a notice of motion for a preliminary injunction was made returnable on May 6, 1947. (R. 36). The procedure evolved by Congress and this Court allows the United States sixty days after service upon the United States Attorney for answer in District Court Tucker Act suits (28 U. S. C. [1946 ed.] 763), and a similar period under the Federal Rules of Civil Procedure for suits against the United States, its officers, and agencies (F. R. C. P., Rule 12 (a)).<sup>45</sup> These relatively lengthy periods are established in order that the necessary reports may be obtained, and that the Government's law officers may familiarize themselves with the facts before answering. Under the sixty-day rule, the Government would have had until June 28, 1947 for answer. Fifty days before that date (*i. e.* May 9, 1947 (R. 50)) an appeal to the court of appeals had already been taken by respondent. The speedy pace of an injunction suit is at complete variance with the procedural protections with which Congress and the courts have clothed the United States as defending party in contract litigation.

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<sup>45</sup> Rule 19 of the Rules of the Court of Claims allows forty days for demurrer, plea, or answer.



Congress has long recognized contract claims against the United States, and has provided a judicial forum for their determination in the Court of Claims and the district courts, but it has never authorized the affirmative relief which respondent demands. Recently, Congress recognized a large class of tort claims against the sovereign, and provided the district courts as the forum, but it was careful to provide that the claim could be "*for money only.*" Federal Tort Claims Act, Sec. 410 (a) (28 U. S. C. [1946 ed.] 931 (a)). These legislative consents-to-suit indicate the consistent congressional policy, in contract as well as in tort, against relief other than damages. This express policy, reflecting the needs of public administration, properly bears much weight, we believe, in deciding whether the instant suit for affirmative relief against a government official should be viewed as tantamount to an unconsented suit against the United States.

E. MANDAMUS WILL NOT LIE SINCE NO MINISTERIAL AND  
NON-DISCRETIONARY ACT IS INVOLVED

Some argument is offered that mandamus or a mandatory injunction will lie here because "the duty to load the coal when and if asked or directed would be purely a ministerial one" (Br. in Opp., pp. 14, 21). This argument could only prevail if respondent were to show that petitioner and his predecessor had no discretion to construe the contract as they did and were compelled to follow respondent's views. We have already

pointed out that neither General Littlejohn nor Mr. Larson could be said to be exceeding his valid *authority* even if respondent's reading of the contract were correct (*supra*, pp. 42-45). The same reasons attest the War Assets Administrator's full *discretion* in the matter. Respondent does not, and cannot, assert a violation of any statutory provision compelling the action it demands (cf. *Houston v. Ormes*, 252 U. S. 469; *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371, 374), and the War Assets Administrator's broad statutory authority to dispose of surplus property (*supra*, pp. 3-4) endows him with sufficient discretion to take whatever action he deems desirable in entering upon and performing contracts. Nor was this discretion exhausted "at the time the contract with appellant [respondent] was entered into" (R. 58), as the court of appeals said. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 127, certainly indicates that the agents of the United States have as much internal discretion as those of a private contractor to determine what performance was called for. *Wells v. Roper*, 246 U. S. 335, 337-338 (*supra*, pp. 44-45), expressly holds that a government contracting official exercises discretionary and non-ministerial authority in construing a government contract, even though it be assumed "that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States." See, *supra*, p. 45.

And, if it be material, it is undeniable that War Assets' position in the dispute between the parties over the terms of payment was, at the least, a substantial one. (Cf. Point III, *infra*.) In these circumstances, respondent is a far cry from proving the plainly ministerial and non-discretionary duty to read the contract in the way it desires, which is an indispensable prerequisite to mandamus or a mandatory injunction. Cf. *Brashear v. Mason*, 6 How. 92, 102; *International Contracting Co. v. Lamont*, 155 U. S. 303; *Goldberg v. Daniels*, 231 U. S. 218; *Work v. Rives*, 267 U. S. 175; *Wilbur v. United States*, 281 U. S. 206, 218-219; Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine* (1946), 59 Harv. L. Rev. 1060, 1075 (quoted *supra*, p. 65).

It is no answer to say that a full trial will show respondent's construction of the contract to be correct. The issue is not the error or accuracy of the War Assets' interpretation, but the discretion reposed in its officials to make that construction. Exactly a century ago, this Court punctured a similar argument: "It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding



by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals." *Brashear v. Mason*, 6 How. 92, 102.

In sum, the instant suit has all the characteristics of an action in which the United States alone is the real party in interest, and in which the defending public official cannot properly be sued, and for those reasons the complaint should be dismissed as maintaining an unconsented suit against the United States.

## II

THE DISTRICT COURT DOES NOT HAVE EQUITABLE JURISDICTION TO GRANT SPECIFIC PERFORMANCE SINCE RESPONDENT HAS AN ADEQUATE REMEDY AT LAW

A SUIT FOR DAMAGES IN THE COURT OF CLAIMS IS AN ADEQUATE REMEDY

Even if the complaint should not be dismissed as initiating an unconsented suit against the United States, we believe that equity jurisprudence requires its dismissal on the ground that respondent has an adequate remedy at law. Under Section 267 of the Judicial Code, 28 U. S. C. 384, as well as the established equity rule, United States courts may not sustain an equity action "where a plain, adequate and complete remedy may be had at law." Applied to a suit for specific performance, this principle requires an equity

court normally to refrain from ordering the transfer or delivery of non-unique chattels purchasable in the market. 5 Williston, *Contracts* (rev. ed. 1937), sec. 1419-1419A; 4 Pomeroy, *Treatise on Equity Jurisprudence* (5th ed.), sec. 1402. Coal has frequently been held such ordinary non-unique goods, and contracts for its purchase not specifically enforceable. *Consolidated Fuel Co. v. St. Louis Southwestern Ry. Co.*, 250 Fed. 395 (C. C. A. 8); *Black Diamond Coal Mining Co. v. Jones Coal Co.*, 200 Ala. 276; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630; *George E. Warren Co. v. A. L. Black Coal Co.*, 85 W. Va. 684; *Pollard v. Clayton*, 1 K. & J. 462, 69 Eng. Reprints 540; *Fälcke v. Gray*, 4 Drew. 651, 657-658, 62 Eng. Reprints 250, 252; *Fothergill v. Rowland*, L. R. 17 Eq. 132.

Respondent's complaint nowhere asserts any unique or special quality in these 10,000 tons of coal. It rests its call upon equity solely on (1) loss of standing in the trade; (2) loss of profits and liability in damages to its repurchaser, Penn-Pocahontas; and (3) impossibility of ascertaining such profits or liability (R. 8). But each of these items of alleged irreparable damage could be avoided by outside purchase of coal, even at a higher price, and a subsequent suit against the United States in the Court of Claims for any difference. The complaint does not allege that other coal could not be secured, or that respondent could

not fulfill its repurchase agreements with other coal. Respondent's unwillingness to take that course presents no reason for the intervention of equity, for if that course had been followed, respondent's damages, if any, could have been measured in money terms, and would be plainly ascertainable. Cf. *Texas & Pacific Ry. Co. v. Marshall*, 136 U. S. 393, 405; *Boston Wool Trade Ass'n. v. Snyder*, 161 F. 2d 648, 649 (App. D. C.); *Consolidated Fuel Co. v. St. Louis Southwestern Ry. Co.*, 250 Fed. 395, 398-399 (C. C. A. 8).

We have noted that the complaint neither asserts any unique quality in the coal, nor alleges that satisfactory coal cannot be secured on the open market or elsewhere. In its argument, however, respondent has stated that this coal is unique because, being surplus, it can receive special allocations for export not available to newly-mined coal, and that respondent intended its purchase to be for export (Br. in Opp., pp. 27-28). This contention as to the special status of the coal does not appear in the complaint or even in the affidavits filed on behalf of respondent (R. 33-34, 53-54).<sup>46</sup> In any case, we are advised by the

<sup>46</sup> The only possible reference in the complaint bearing on this claim is the portion of the fourth paragraph partially quoted in respondent's Brief in Opposition, p. 27. ("Upon entering into these contracts the plaintiff applied for special railroad rates to Texas ports which were granted and for special export licenses outside the regular export allocation system of the U. S. government for newly mined coal, which were granted" (R. 2)). But this allegation wholly relates to



Office of International Trade, of the Department of Commerce, that prior to September 1, 1947, during the period involved in this suit and when the judgment of the trial court was entered, export licenses were required for the exportation of all coal exceeding \$100.00 in value, and that in granting such export licenses no distinction was made between coal originating through the War Assets Administration, newly-mined coal, or other coal originating from private sources.<sup>47</sup> There was, therefore, no basis for any claim of uniqueness; newly-mined coal or other nonsurplus coal would have been granted export licenses on the same basis.

But even if this coal were concededly unique, respondent would be in no position to demand equitable relief. It resold the coal to the Penn-Pocahontas Coal Company, and the repurchaser resold to an agency of the Portuguese Government on terms which the complaint sets forth (R. 7). Respondent's loss of profits, as well as its potential liability to its repurchasers, could be adequately calculated from the stated terms of the

*prior* coal contracts, entered into and performed in 1946, and not at all to the instant transaction. There is no similar allegation or reference relating to the instant coal.

<sup>47</sup> The Office of International Trade also states that, during this period, it licensed freely the export of coal in excess of the quantities generally allocated for export where the exportation would throw no additional burden on ports having mechanical loading facilities, and that, therefore, such licenses were freely granted for the export of coal through Gulf ports which did not have mechanical loading facilities.

resale to Penn-Pocahontas and the further resale to the Portuguese Government. Indeed, respondent expressly sets forth figures from which its damages could be calculated as easily as in most actions at law (R. 7). The loose claim that "its standing with the trade and with the Penn Pocahontas Coal Company will be lost" (R. 8), an assertion hardly unique to the present case, is not an item of contract damages normally cognizable in the courts (cf. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540), and should not move an equity court to use the extraordinary remedy of specific performance.

Considerations of policy and practicality similar to those we have set forth in our sovereign immunity argument (*supra*, pp. 63-70) urge the most cautious use of affirmative equitable remedies against the Government, even in cases in which the plaintiff could obtain such relief against a private defendant. "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury." *Hurley v. Kincaid*, 285 U. S. 95, 104; cf. *Harrisonville v. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338.

B. IN ANY EVENT, THE COURT OF APPEALS ERRED IN HOLDING THAT THE COAL INVOLVED IS OF SUCH A "PECULIAR NATURE" AS TO WARRANT EQUITABLE RELIEF

This case was before the court of appeals on respondent's appeal from the district court's dismissal of its complaint and denial of a preliminary injunction on the ground that the suit was an unwarranted one against the United States. The record contained the complaint, motions, and some affidavits, but no evidence had been taken, and no findings of fact had been made by the lower court. As we have pointed out above (*supra*, pp. 74-76), neither complaint nor affidavits ever alleged any unique or peculiar quality in the coal and there had been no trial of that issue in the district court. The court of appeals held that respondent was entitled to a full hearing and a trial on the merits of its claims that it had properly performed its part of the contract and that title had passed to it. But the court went out of its way to deny the Government a full hearing and trial on the issue of the "peculiar nature" of the coal by stating flatly in its opinion, without benefit of any evidence or findings on the point, that if respondent's substantive claims were upheld, "the peculiar nature of the coal involved soundly bases appellant's [respondent's] resort to equity for relief" (R. 58), and by accepting fully all of respondent's contentions to this effect, even though the issue is a factual one which had never been properly mooted. As a matter of plain fact, the court of appeals was in error in its statements



as to the special status of "surplus" coal (*supra*, pp. 75-76), and at the very least the petitioner should be entitled, if the case is remanded for a trial on the merits, to show that this coal has no "peculiar nature" warranting equitable relief. The court of appeals cannot foreclose that right by a gratuitous holding on an issue which it could not properly decide for itself at that stage of the litigation.

### III

#### RESPONDENT BREACHED ITS CONTRACT, AND, IN ANY EVENT, TITLE HAS NOT PASSED

Our entire argument as to sovereign immunity (Point I, *supra*) and as to equitable jurisdiction (Point II, *supra*), rests on the immateriality of respondent's substantive claims that title has passed to it and that it duly performed its share of the contract. We believe that on both points it makes no difference whether respondent is right or wrong, whether title is now actually in the United States or in respondent, or whether respondent or the United States breached the contract. As for Point I, these are all issues on which the United States is entitled to be heard, and on which it cannot be heard in this forum; and, of course, respondent could not in any event claim specific performance (Point II) until it had proved itself right on all these issues. But on both points it may be material to show that the Government's defense on the merits is not frivo-

lous or merely colorable, but has substance (see *supra*, pp. 60-62); and it is in that connection, and for that purpose, that we undertake to show the error of respondent's substantive contentions.

#### A. RESPONDENT BREACHED ITS CONTRACT

1. Respondent's agreement, as spread on the face of the complaint and exhibits, plainly required it to place \$17,500 in the Dallas bank, to assure payment to War Assets Administration on the submission of invoices. Respondent's offer stated that "contract shall be on *cash* basis based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank in Dallas" (R. 12; italics supplied). War Assets' letter of acceptance stated that "your terms of placing \$17,500.00 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted" (R. 13), and added that "it may be to your advantage to deposit the \$17,500 with this office for deductions from the amount as shipments are made until this sum is exhausted, or until the coal is completely shipped, whichever occurs first" (R. 13). The War Assets' forms of "Offer to Purchase" and "Sales Memorandum" (R. 3, 14-17), which respondent executed, contained, as one of the standard conditions of sale, the provision that "unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check,

cashier's check, or money order prior to shipment of the property or its removal by Purchaser" (R. 15, 17). The face of the Sales Memorandum signed by respondent also contained the typewritten statement in the box labeled "Terms": "Cash on presentation of wt. tickets as shipped." We think it plain from this recital that the parties' agreement was that respondent would deposit the full \$17,500 in cash in the Dallas bank before any of the coal was shipped, and that the Government would receive payment from this fund as shipments were made. War Assets was anxious to assure itself of full payment for the entire load; shipment of 10,000 tons of coal would take some time, and the Administration's policy, as its sales conditions indicated, was to place no reliance on the buyer's financial standing and not to extend credit; accordingly, a cash deposit of the full sum prior to shipment was essential.

2. Just as clearly, respondent did not comply with this requirement. It first informed War Assets (on March 28, 1947) that it had deposited only \$5,000 (supplied by the repurchaser, Penn-Pocahontas Coal Company) in the Dallas bank and that the balance of the funds would be placed in that bank *after* the first shipment began to move (R. 3-4, 18). War Assets immediately wired, in reply, that the Dallas bank refused to guarantee payment for all the \$17,500 unless that sum was placed on deposit in the bank for that purpose. The telegram continued: "unless \$17,-



500 is deposited First National Bank Dallas for payment of total quantity this coal by noon April 4 sale will be cancelled and other disposition made" (R. 20).<sup>48</sup> As respondent surely knew, this telegraphic notification merely carried out the contract's requirement that the full amount be deposited *in cash* prior to any shipment.

Nevertheless, on the deadline day (April 4th), respondent wired that it had placed with the Dallas bank a "letter of credit covering the balance of \$12,500 for the specific purpose of meeting your invoices" (R. 22), and adding: "This places on hand in the First National Bank Dallas the full amount of \$17,500 to meet this purchase" (R. 22). Since War Assets had bargained for a *cash* deposit, and not for an unknown letter of credit, it at once (April 4, 1947) expressed disapproval and again gave formal (ten day) notice of cancellation (R. 4-5, 23). At that time (April 4-10, 1947), the actual letter of credit from the New York Corn Exchange Bank had not yet been received in Dallas, and its terms were only partially known; War Assets and the Dallas bank

<sup>48</sup> War Assets' original letter stated that "loading must be accomplished by March 15" (R. 11); after respondent had replied that it was impossible to comply with that deadline (R. 12), War Assets' letter of March 19th waived that requirement but indicated that immediate shipment was necessary (R. 13). The Conditions of Sale required "specific shipping instructions" to be received from the purchaser "within ten (10) days from the date of the Sales Memorandum" (R. 15, 17). The Sales Memorandum was dated March 28, 1947 (R. 16).

both apparently believed that the drafts under the letter of credit would have to be paid in New York and War Assets informed the bank of its preference "that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn under a letter of credit to be paid in New York" (R. 24, 25). Of course, War Assets' agreement entitled it to payment by a Texas bank it knew from previous dealings, and not by drafts on a distant New York bank, entailing delay and the risk of rejection of bills of lading.

The original letter of credit did require payment in New York (R. 26), as the Dallas Bank and War Assets surmised, and respondent then had it amended in New York, on April 14, 1947, to permit drafts and documents to be negotiated at the Dallas bank not later than June 7, 1947 (R. 27). The exhibits do not make clear the exact course of events after April 14th, nor the full understanding of the parties. On April 16th, War Assets formally cancelled the sale in a telegram to respondent which stated that the Administration had been notified by the Dallas bank that it did "not have sufficient authority to pay for this material upon presentation of invoices" (R. 29). On the same day (April 16th), a letter from the Dallas bank to War Assets' regional office quoted a telegram from the New York bank as amending the letter of credit to permit drafts and documents to be *negotiated* at the Dallas

bank's office not later than June 7, 1947, instead of being presented at the New York bank's office; the Dallas bank's letter added that it now appeared to have "the necessary authority to *pay* drawings against the above-mentioned letter of credit when presented to our office accompanied by the required documents and the original letter of credit" (R. 28; italics supplied).<sup>49</sup> On April 19, 1947 (three days after the cancellation), the Dallas bank transmitted to War Assets a copy of a correcting telegram received from the New York bank which stated that its earlier wire "should have read drafts and documents presented at your office not later than June seventh instead of negotiated at your office stop pay drafts when presented at your office debiting our account with your good selves" (not included in record).

3. At the least, the foregoing documents reveal the following conclusive facts bearing on respond-

<sup>49</sup> If the Dallas bank were merely to negotiate the drafts, in the sense of purchasing the drafts (drawn on the New York bank) from War Assets, War Assets would remain liable to the Dallas bank should the New York institution later refuse for any reason (*e. g.*, because proper documents were not attached) to honor the draft on presentation to it. On the other hand, if the Dallas bank were fully authorized to make payment on behalf of the New York bank, the former could not go against War Assets on failure of the New York bank to reimburse it. Until receipt of definite authority to make conclusive payment, the Dallas bank was merely an advising or notifying bank, without obligation to War Assets. (Cf. R. 24-29). See Finkelstein, *Legal Aspects of Commercial Letters of Credit* (1930), pp. 146-7, 154-5, 160-3.



ent's compliance with its contractual requirements: (1) At no time was there on deposit in the First National Bank in Dallas the cash sum of \$17,500 for payment of respondent's contractual obligation; (2) at least prior to April 16, 1947, War Assets correctly understood that it could not secure payment at all in Dallas but would have to present drafts and documents to the New York bank under a letter of credit; (3) on April 4, 1947, War Assets gave formal notice that the contract would be cancelled in ten days from that date unless the sum of \$17,500 was on deposit with the Dallas bank by the cancellation date (*i. e.*, April 14, 1947);<sup>50</sup> (4) when the contract was actually cancelled twelve days later, on April 16, 1947, the required sum was not on deposit and War Assets had not even yet received unequivocal assurance that it could secure payment at all in Dallas; (5) at the time the contract was cancelled on April 16th, although the agreement called for a full advance cash deposit, respondent was prepared and willing to make payment only by means of a letter of credit which War Assets had never seen but which plainly imposed certain substantial conditions precedent to payment. The only conclusion to which these facts add up is

<sup>50</sup> The Conditions of Sale provided that the "Seller may also \* \* \* in the event of default on the part of Purchaser in making payment or otherwise, upon giving ten (10) days written notice to Purchaser, rescind the sale \* \* \* \*"

(R. 17).

that respondent did not comply with its obligation to make a cash deposit of \$17,500 in its Dallas bank, but attempted to substitute payment by means of a letter of credit which, at the moment when War Assets cancelled the contract on April 16th, did not even clearly permit payment to War Assets in Dallas. And even if War Assets had been willing to forego its right to a cash deposit and to accept, in substitution, Dallas payments under a letter of credit, the terms of the letter of credit proffered by respondent would have been unsatisfactory on several important counts. See fn. 9, *supra*, p. 12. War Assets was therefore fully justified in cancelling the contract and withholding delivery, under paragraph 7 of the Conditions of Sale (fn. 50, *supra*, p. 85), as well as under Sections 53 and 65 of the Uniform Sales Act (D. C. Code, Sections 28-1402, 28-1503).<sup>51</sup>

#### B. TITLE TO THE COAL HAS NOT PASSED TO RESPONDENT

Respondent pitches its entire case against the immunity bar on the proposition that title passed to it, although the coal was never delivered to the carrier. As we have said, passage of title would not be dispositive; irrespective of a technical passage of title, this would still be a suit against the United States.<sup>52</sup> However, as we shall demon-

<sup>51</sup> This conclusion is true whether or not title had passed to respondent.

<sup>52</sup> If the immunity barrier be passed, respondent could not prevail in any event, regardless of the incidence of title, since

strate, title did not pass to respondent under all the conventional doctrines of sales law. True, respondent alleges in its complaint that title has passed to it (R. 6-7), but that is a pleader's conclusion which is contradicted by the complaint's own exhibits and cannot be taken as true. Cf. *Nortz v. United States*, 294 U. S. 317, 324-325; *Newport News Co. v. Schauffler*, 303 U. S. 54, 57; *United States v. John J. Felin & Co., Inc.*, 334 U. S. 624, opinion of Frankfurter, J., pp. 639-640.

1. The indicia of the parties' intention, as revealed in the contractual documents, all point to retention of title by the Government, at least until the coal was loaded on the cars at Camp Maxey. First, this was a true technical *cash sale* of specific goods, in which traditionally title is exchanged for, and at the time of, payment. Cf. Vold, *Handbook of the Law of Sales*, sec. 62-66, pp. 166-177; 1 Williston, *Sales* (2d ed.), pp. 811-814; *Turner v. Moore*, 58 Vt. 455. Plainly, no credit was to be extended to respondent, and the Government was anxious to secure payment before losing possession or control of the coal; shipment and payment were intended to be roughly simultaneous. War Assets' acceptance letter referred to "payment upon presentation of our invoices" (R. 13). The Conditions of Sale required that "Unless credit is provided for in the contract, it breached the contract and the cancellation was justified. *Supra*, pp. 80-86.



Sales Memorandum, payment must be made in currency, by the Purchaser's check, Cashier's check, or money order *prior to deposit of the property or its removal by Purchaser*" (R. 17; italics supplied); and the face of the Sales Memorandum specified that the "Terms" were to be: "*Cash on presentation of wt. tickets as shipped*" (R. 16; italics supplied).

Secondly, the agreement contemplated a sale "FOB cars, Camp Maxey, north of Paris, Texas" (R. 11); the printed Conditions of Sale provided: "Unless otherwise specifically stated in the Sales Memorandum, all sales are made F. O. B. common carrier (cars or trucks) . . . (R. 17). It is one of the guiding rules of sales law that, absent a contrary intention expressly appearing, a provision for delivery f. o. b. point of shipment is the strongest evidence of intention to pass title to the buyer at the time, and not before, the goods are delivered by the seller to the carrier and placed on board the freight cars. Note: *F. o. b. provision in sale contract as affecting time or place of passing of title*, 101 A. L. R. 292; 1 Williston, *Sales* (2d ed.), sec. 280b; Vold, *op. cit.*, *supra*, p. 129; *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 413, 416, 419; *Perkins v. Minford*, 235 N. Y. 301, 304; *Belding Hall Mfg. Co. v. Mercer & Ferndon Lumber Co.*, 175 Fed. 335, 338 (C. C. A. 6); *Nelson Bros. Coal Co. v. Perryman-Burns Coal Co.*, 48 F. 2d 99, 100 (C. C. A. 2); *In re Globe Varnish Co.*, 114 F. 2d 916, 918 (C. C. A. 7),

certiorari denied, 312 U. S. 690; *Amtorg Trading Corp. v. Higgins*, 150 F. 2d 536, 538-539 (C. C. A. 2); *Hettrick Mfg. Co. v. Srere*, 235 Mich. 306; *State ex rel. Pittsburgh Coal Co. v. Patterson*, 138 Wis. 475; *Rudy-Patrick Seed Co. v. Roseman*, 234 Iowa 597; *J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co.*, 135 Me. 267. This presumption as to f. o. b. contracts is embodied in Rules 4 (2) and 5 of the rules for ascertaining intention as to the passage of title, contained in Section 19 of the Uniform Sales Act, which Congress has made applicable to the District of Columbia (D. C. Code, sec. 28-1203).<sup>53</sup> See Whitney, *Sales* (3d ed., 1941); sec. 91; *Standard Casing Co. v. California Casing Co.*, *supra*; *Rudy-Patrick Seed Co. v. Roseman*, *supra*. The same rule is followed in Texas, which has not adopted the Uniform Act.

<sup>53</sup> "Rule 4 (2). Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 28-1204 [not relevant here]. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents.

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or to a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

*Alexander v. Heidenheimer*, 221 S. W. 942, 943 (Comm. of App. Tex.); *Ehrenberg v. Guerrero*, 225 S. W. 86 (Tex. Civ. App.). And there is no doubt that it applies to agreements relating to specific and ascertained goods, such as those involved here, as well as to future or unascertained goods. Cf. Uniform Sales Act, secs. 17-19; D. C. Code, secs. 28-1201 through 28-1203, Vold, *op. cit.*, *supra*, p. 129; *Nelson Bros. Coal Co. v. Perryman-Burns Coal Co.*, *supra*; *State ex rel. Pittsburgh Coal Co. v. Patterson*, *supra*; *Kudy-Patrick Seed Co. v. Rosemun*, *supra*; *J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co.*, *supra* (all involving goods which were plainly specific and ascertained at the time the sales agreement was made).

Thirdly, until timely shipment, risk of loss was on the United States. Paragraph (6) of the Conditions of Sale provided: "If the property is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (5) above for removal or the issuance of shipping instructions, Seller's liability shall, at the election of Seller, be limited to the replacement of the property lost, damaged or destroyed or refunding any amount paid by Purchaser therefor" (R. 17).<sup>54</sup> The distribution of

<sup>54</sup> Paragraph 7 of the Conditions of Sale provided: "If Purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in



risk of loss is another significant indication of the parties' intention as to the incidence of passage of title. Vold, *op. cit. supra*, pp. 124, 127-128; *State ex rel. Pittsburgh Coal Co. v. Patterson*, 138 Wis. 475. In *Nashville Industrial Corp. v. United States*, 71 C. Cls. 405, on which respondent relies heavily (Br. in Opp., pp. 25-27), the Court of Claims stressed a specific contractual provision placing risk of loss on the purchaser as indicating its ownership of the goods. 71 C. Cls. at 418-419).<sup>55</sup>

Thus, we have in this case (i) an f. o. b. sale, (ii) strict insistence on cash payment preceding shipment, and (iii) risk of loss on seller prior to shipment. Separately, each of these is strong indication of an intention to pass title after loading for shipment and not before; together, their effect is conclusive.

2. Relying on the truism that all such indicia are rules of presumption subordinate to proof of the parties' actual intention, respondent urges that the Sales Memorandum's use of the terms "contract of sale" or "sale" conclusively discloses an paragraph (5) above the risk of loss, damage or destruction of the property shall be upon Purchaser."

<sup>55</sup> The contract in the *Nashville Industrial Corp.* case contained an "f. o. b. cars" shipping point provision, but the court did not consider its effect in holding that title had passed; moreover, the contract apparently permitted some credit period after shipment, and did not, as here, require payment prior to, or concurrently with, shipment. 71 C. Cls. at 410-412, 416-417.

agreement transferring the property in the goods at the moment of execution. The argument appears to be that unless the parties rigidly employ the phrase "contract to sell," a present transfer of title must have been intended (Br. in Opp., pp. 23-24).<sup>56</sup> But a general use of "sale" or "contract of sale" in printed standardized contract conditions, designed for all types of sales dispositions, can hardly counterbalance the specific indications pointed out above. These and similar terms are frequently used, in the same general sense, to refer to all consensual transactions disposing of property: in statutes *e. g.*, the "Uniform Sales Act: An Act to make Uniform the Law Relating to the Sale of Goods"); in texts (*e. g.*, Waite, *Sales* (2d ed.), p. xiii); in judicial opinions (*e. g.*, *Standard Casing Co., Inc. v. California Casing Co., Inc.*, 233 N. Y. 413, 416 (Cardozo, J.); cf. *White v. Triest*, 100 Fed. 290, 291 (C. C. S. D. N. Y.)); and in commercial contracts. In the case of the latter, it has repeatedly been held that "such words are not conclusive. They are frequently used in contracts which are executory sales rather than completed sales." *Rudy-Patrick Seed Co. v. Roseman*, 234 Iowa 597, 602;

<sup>56</sup> The *reductio ad absurdum* of respondent's argument is found in the provision, attached to the War Assets form of "Offer to Purchase," by which the Government reserved the right, "in connection with the sale of surplus property \* \* \* to withdraw all or any part of the property included in the sale at any time prior to a *Contract of Sale*" (R. 15; italics supplied).

see *Vold, op. cit., supra*, p. 127; *Waite, op. cit., supra*, pp. 269-270. The narrow, technical usage espoused by respondent does not accord with normal practice. Here, the substantive provisions of the agreement relating to payment, delivery, and risk of loss—rather than the tense of the verb “to sell” used in the printed documents—determine the location of title.

Respondent also appears to claim that the case is governed by Rule 1 of Section 19 of the Uniform Sales Act (D. C. Code, Sec. 28-1203), establishing the rules for “ascertaining the intention of the parties,” that “where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.” But this rule only applies “unless a different intention appears,” and such an intention is disclosed, as we have pointed out, by the Government’s insistence on exchanging the coal for cash, by the f. o. b. clause, and by the provisions distributing the risk of loss. Moreover, an f. o. b. shipping point sale is not controlled by Rule 1, which concerns only sales in which the seller has nothing further to perform; on the contrary, since the seller is under a duty to load the goods aboard the cars, the governing rule is Rule 5, or, possibly, Rule 4 (2). 1 Williston, *Sales*, (2d ed.), Secs. 264, 278, 280b; and see *supra*, pp. 88-90. Also, even where nothing remains to be done by the seller, a technical “cash



sale" is excepted from the operation of Rule 1. 1 Williston, *op. cit.*, *supra*, p. 531.<sup>57</sup>

For these reasons, we submit that the respondent's own complaint reveals its plain breach of the sales agreement, and proves that, in any event, title has not passed.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous and should be reversed.

PHILIP B. PERLMAN,  
*Solicitor General.*

H. G. MORISON,  
*Assistant Attorney General.*

PAUL A. SWEENEY,

OSCAR H. DAVIS,  
*Attorneys.*

SEPTEMBER 1948.

<sup>57</sup> In the court below, respondent also argued that the statutory rules for ascertaining the parties' intention regarding passage of title, as well as the other indicia of intention, come into operation only after it has been determined—by what means respondent did not indicate—that the contract is a "contract to sell" (agreeing to transfer the property in the future) and not a "sale of goods" (transferring the property immediately). Since the instant transaction was said to be a "sale of goods," it was thought that no regard need be paid to rules or other indicia. This argument is obviously fallacious. The whole purpose of the apparatus of rules is to aid in determining whether title passes as soon as the contract is made, or at a later time, and, if so, at what moment. Indeed, Rule 1 of Section 19 of the Uniform Sales Act (D. C. Code, sec. 28-1208) deals with a case in which title passes when the contract is made; on respondent's theory, this would be an absurd provision.

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# In the Supreme Court of the United States

OCTOBER TERM, 1947

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No. 649

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMIN-  
ISTRATOR AND SURPLUS PROPERTY ADMINISTRA-  
TOR, PETITIONER

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

---

## PETITIONER'S MOTION TO STRIKE RESPONDENT'S BRIEF IN OPPOSITION

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Now comes the Solicitor General on behalf of the petitioner herein, and prays that the respondent's Brief in Opposition to the Petition for a Writ of Certiorari be stricken because it contains scandalous matter. *Green v. Elbert*, 137 U. S. 615, 624; *Royal Arcanum v. Green*, 237 U. S. 531, 546-547. Compare *Cox v. Wood*, 247 U. S. 3, 6-7, where, however, the language seems to have been more restrained.

The principal objectionable passages in respondent's Brief in Opposition in the present case are the following:

Petitioner sought to abuse and insult the intelligence of the Court of Appeals



by this same type of unsupportable claim which he must of necessity know to be completely false. Yet he persists with this same technique of urging unsupportable arguments which he must know to be completely false in this Court again. It is outrageous that an officer of the U. S. under oath to uphold the laws of the United States and supposedly advised of the rudiments of ethical conduct should advance frivolous argument merely for the purpose of delay and should dare to use so contemptible and obviously dilatory a device which outrages common decency. (p. 13.)

\* \* \* \* \*

Petitioner then assaults (at p. 20, brief for petitioner) the importance of title, a fundamental legal conception having vital necessity and meaning to all free peoples, and countless consequences in the law of sales. He forgets that *United States v. Lee* turned specifically on what he casually terms "technical doctrines of passage of title." He asks this Court to brush aside ownership of property as merely "technical." Many of his predecessors in this immoral doctrine, who have regarded the ownership of another as "technical" are filling our jails. (p. 18.)

\* \* \* \* \*

Toward the bottom of page 16, petitioner goes on in an attempt to place himself above the law by insinuating that he has some celestial status that removes

him personally from the reach of the law to which "a recalcitrant private vendor" would be subjected. This is indicative of petitioner's concept of all law—namely, that he is above it, that he is the law himself, and that he is immune from the enforcement of the law upon him by this or any other Court.

\* \* \* \* \*  
 \* \* \* \* \* When the day comes that anyone in respondent's position cannot resort to the Courts for protection of his property under law merely because some bureaucrat seeks to hide his incompetence and injustice behind a protecting shield of sovereign immunity, both liberty and reason shall have perished from the land. (p. 15.)

\* \* \* \* \*  
 \* \* \* \* \* The depths of petitioner's wilful ignorance of these boundaries of sovereign immunity under a free constitution like ours is revealed by his misuse of *Goldberg v. Daniels*, 231 U. S. 218. (p. 16.)

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

APRIL 1948.

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1947.

N. 649 31.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, *Petitioner*;

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
*Respondent*.

**RESPONDENT'S MOTION FOR LEAVE TO WITH-  
DRAW BRIEF AND FILE ACCOMPANYING SUB-  
STITUTE BRIEF.**

SETH W. RICHARDSON,

By .....

T. PETER ANSBERBY,

.....  
STEPHEN J. McMAHON, JR.

*Counsel for Respondent.*

Motion Consented To:

PHILIP B. PERLMAN,

*Solicitor General.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

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No. 649

---

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, *Petitioner,*

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
*Respondent.*

---

**RESPONDENT'S MOTION FOR LEAVE TO WITH-  
DRAW BRIEF AND FILE ACCOMPANYING SUB-  
STITUTE BRIEF.**

---

In view of the motion of the Solicitor General to strike respondent's brief in opposition to certiorari, comes now the respondent herein and respectfully requests that it be allowed to withdraw its brief in opposition to petition for certiorari in the above cause and in lieu thereof to file, in

time, the accompanying substitute brief, eliminating therefrom portions of the brief now on file which have been designated as objectionable by the Solicitor General, with apologies to this Court and to the Solicitor General in the premises.

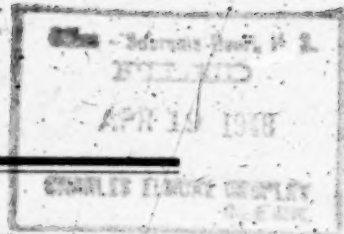
Respectfully submitted,

SETH W. RICHARDSON,

By .....  
T. PETER ANSBERRY,

.....  
STEPHEN J. McMAHON, JR.  
*Counsel for Respondent.*

Motion Consented To:  
PHILIP B. PERLMAN,  
*Solicitor General.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947. 48

No. 31

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, *Petitioner*,

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION.

**RESPONDENT'S BRIEF IN OPPOSITION TO PETI-  
TION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA.**

SETH W. RICHARDSON,  
T. PETER ANSBERRY,  
STEPHEN J. McMAHON, JR.,  
*Attorneys for Respondent.*

*Of Counsel:*

DAVIES, RICHBERG, BEEBE,  
BUSICK & RICHARDSON.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

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No. 649.

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ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, *Petitioner*,

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION.

---

**RESPONDENT'S BRIEF IN OPPOSITION TO PETI-  
TION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA.**

---

**OPINIONS BELOW.**

The District Court of the United States for the District of Columbia (by Justice Jennings Bailey), dismissed respondent's complaint off the bench in an oral decision without opinion. The United States Court of Appeals for the District of Columbia reversed the dismissal upon opening, answering, and reply briefs, after hearing four hours of argument by counsel. The unanimous opinion of the Court (Justices Clark, Wilbur K. Miller and Prettyman) is reported at 165 Fed. 2nd 235 (Adv.) and appears at page 55 through 59 of the record.



## JURISDICTIONAL STATEMENT.

The petitioner (at page 2) invokes Sec. 240(a) of the Judicial Code without reference to Rule 38(5) promulgated by this Court thereunder. The petition is deficient in the following respects under the criteria of said rule:

1. Petitioner cannot and does not attempt to show any conflict between circuits.

2. Petitioner cannot and has not attempted to show probability of local conflict.

3. Petitioner cannot and has not shown an open Federal question heretofore undecided by this Court.

4. Petitioner cannot and has not shown any departure from the accepted standards of judicial proceedings below.

5. Petitioner cannot and has not shown a question of substance of general importance relating to the construction or application of the Federal Constitution or a Federal statute or treaty.

6. Petitioner cannot and has not shown a failure by the Court below to give proper effect to a decision of this Court.

7. Petitioner wishes to retry the recent case of *Land v. Dollar*, 330 U. S. 731, which restated the long standing rule of demarcation between sovereign immunity and the property rights of citizens. The very same bench which decided *Land v. Dollar* below, unanimously decided the instant case (Justices Clark, Wilbur K. Miller and Prettyman).

8. Petitioner invokes the doctrine of sovereign immunity and specifies it as error below without specifying as error the conclusions of local contract law upon which sovereign immunity would be wholly dependent (the question of passage of title and the question of breach of contract).

9. Such questions of local contract law upon which sovereign immunity depends have been thoroughly examined and argued at length for four hours before the Court of Appeals; yet the petitioner now in effect requests that this

o Court re-examine these well settled and long established local rules of contract which the Court of Appeals has unanimously re-affirmed in the instant case.

10. In Point No. 5 of his specification of error (p. 14 of Petition) Petitioner challenges the Court of Appeal's right to hold it had equitable jurisdiction because there was no plain, adequate and complete remedy at law. It is respectfully submitted that the ruling below was correct; but, in any event this is not a valid reason for certiorari under this court's aforementioned rule.

### QUESTIONS PRESENTED.

Whether a government official, duly authorized to dispose of government surplus, who has disposed of surplus coal of unique value by a binding contract of present sale, thereby transferring title to a citizen, may recapture title thereto by his own act of will, resell at the same price, and thus confiscate the citizen's property wholly without authority in law; and, when charged therewith by a sworn complaint, employ a *speaking demurrer denominated a motion to dismiss* to cloak himself with sovereign immunity by asserting in affidavits only and not by answer, an affirmative defense—title in the United States—in denial of the allegation of the citizen's title in the sworn complaint and its exhibits, which plainly show a contract of present sale; whether he may assert breach of the contract, also an affirmative defense, in the same way, both without filing an answer or permitting an issue to be reached; *whether this Court* (when the Court of Appeals unanimously has stricken this procedure down, after long and thorough hearing and extensive deliberation, and *remanded* the case or trial on these issues which determine jurisdiction under its recent decision in *Dollar v. Land* affirmed by this Court, and virtually identical on its facts) *should grant certiorari before a final order has been reached below*, and thus permit the government officer to delay even further a trial of the facts of his illegal conduct and further delay trial

on erroneous technical grounds, and by an avoidance<sup>1</sup> of rules of procedure required to assure due process of law? whether review of well settled local contract questions can be obtained from this Court by error specifying only "sovereign immunity" which is predicated on the local questions mentioned?

### STATUTES INVOLVED.

The applicable portions of the Uniform Sales Act are the definitions of sale and contract to sell:

"(1) A *contract to sell* goods is a contract whereby the seller agrees to transfer the property in goods to to buyer for a consideration called the 'price'."

(2). A *sale* of goods is an agreement whereby the seller *transfers* the property in goods to the buyer for a consideration called the 'price'." (D. C. Code 1940, Tit. 28, Sec. 1101) (italics supplied).

Also Section 28-1504 of the D. C. Code (1940) provides:

"*Action for converting or detaining goods.* Where the property in the goods has passed to the Buyer and the Seller wrongfully refuses to deliver the goods, the Buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld." (Section 28-1504 D. C. Code 1940).

### SUMMARY OF COUNTERSTATEMENT.

This suit was instituted by a complaint for injunction and declaratory judgment by respondent to prevent petitioner from further interfering with respondent's property. The property consists of coal in Texas which petitioner had sold to respondent for \$17,500 and then attempted to sell to someone else at the same price. Respondent's pleadings contained their own proof (the contract). Under this contract and the admitted facts passage of title

<sup>1</sup> i. e., by making his affirmative defenses by demurrer supported by surprise affidavits.



to the coal and full compliance with the contract are irrefutable. Indeed it seems petitioner did not elect to challenge the facts by answer because he could not.

On the contrary, the petition for certiorari (page 15, petitioner's brief) confesses the contract. But then by a "motion to dismiss and affidavits" the petitioner uses a speaking demurrer in which he attempts to deny evidentiary facts and assert by demurrer that which he did not put in issue by answer. In pursuance of his erroneous claim to the cloak of sovereign immunity, he argues as if he had filed an answer alleging (1) non-passage of title and (2) breach of contract.

The Court of Appeals for the District of Columbia has gone thoroughly into both of his alleged defenses and unanimously found them unavailable to him under his demurrer. Both are well settled matters of local contract law and are not valid grounds for certiorari.

This Court's attention is respectfully invited to the deficiency of petitioner's specification of error in this respect (Petition p. 14) where petitioner specifies only conclusory "error," i.e., sovereign immunity, without assigning any error as to the two prerequisite contract elements of the decision which control application of the doctrine of sovereign immunity.

### **COUNTERSTATEMENT.**

In early 1946, the Domestic and Foreign Commerce Corporation received information there was a large quantity of bituminous coal, located at various Army camps in Texas and adjoining states, which had been declared surplus and for which the government had received no acceptable bids. The Domestic and Foreign Commerce Corporation purchased somewhat in excess of 100,000 tons of this coal (it pioneered in the field to the great benefit of the government) from the War Assets Administration at a price of \$1.75 per ton, which was about half of its cost to the government. This coal had been in open storage for two years. Coal deteriorates rapidly under these conditions. It was

located at points from which coal did not normally move to ports, and where, therefore, only high class rates existed. (Complaint, Par. 4, R. p. 2.)

The Domestic and Foreign Commerce Corporation arranged for the establishment of special low freight rates to ports, made an extensive market survey, and eventually succeeded in reselling the coal for export at a substantial profit. The Domestic and Foreign Commerce Corporation fully and completely complied with all the terms of its contract with the War Assets Administration and divided the coal fairly among foreign governments to whom the U. S. Government desired that it should go. The movement was of great assistance to the economy of Europe (Complaint, Par. 4, R. p. 2). Because the coal was government "surplus," ~~special export licenses were obtained over and above the regular allocations to the various countries.~~ This of course gave this coal unique value to exporters.

Early in March of 1947, the War Assets Administration offered an additional 10,000 tons to the Domestic and Foreign Commerce Corporation and this was purchased (Complaint, Par. 4, R. pp. 2, 3) through an exchange of letters and telegrams which are Exhibits A through E to the Complaint (App. pp. 10 through 30 incl.).

War Assets then asked that a record of the contract be made on its form denominated "sales memorandum" which is Exhibit E to the complaint, which was done. The contract was made on the same terms and conditions as the previous contract and provided for the payment of cash, on sight draft accompanied by shipping documents, for the coal f. o. b. cars at its location, the exact amount to be determined by railroad weights of the coal.

Domestic and Foreign promptly resold the coal (Complaint, Par. 5, R. pp. 2, 3) Exhibits A through E (R. p. 10 too 16) relying on its previous favorable experience with War Assets Administration and upon legal advice that the coal was specific, ascertained, and deliverable, and that, since the "sales memorandum" repeatedly referred to itself as a "contract of sale" and referred to the coal as "sold to"

the Domestic and Foreign, title had passed to it. In the light of the successful experience known to both parties of the year before, it felt that it might with perfect safety resell to its customers. The coal was resold at a price of \$2.75 per ton plus a share of profit above \$1 per ton to the coal exporting firm known as the Penn Pocahontas Coal Company, a company closely allied to one that was used as exporter the previous year, namely the J. P. Routh Coal Company, whose officers and owners are substantially the same as Penn Pocahontas Coal Company (Complaint, par. 13, R. p. 7). Penn Pocahontas resold to the Portuguese government (Affidavit of Kingsley, R. pp. 33 and 34).

The Penn Pocahontas Coal Company promptly established an irrevocable letter of credit to pay the War Assets for this coal against shipping documents (Complaint, Par. 6, App. p. 4, Exhibits M and N, App. pp. 25, 26). The War Assets Administration, which had solicited the bid, then, in a most unusual way, began to seek an out on its contract. The Dallas office of War Assets Administration began to insist successively that various details of the letter of credit were unsatisfactory to them (Complaint, Par. 6 through 9, R. pp. 4 through 6). Although the Domestic and Foreign Commerce Corporation had repeated changes made through the Penn Pocahontas Coal Company (Complaint, Par. 8, App. p. 5), to satisfy the wishes of War Assets in this respect, the War Assets Administration at Dallas, on April 16, 1947, late in the evening, wired the Domestic and Foreign that its contract was cancelled, and declined to respond to two telegrams and to answer one telephone call attempting to determine the reason for the cancellation (Complaint, Par. 10 and 11, R. p. 6).

Protest was made promptly (i.e., on April 18th) to the Deputy Administrator in Washington, General Mollison, and to the then General Counsel, Col. Jess Larson (Counter-affidavit of Kingsley, R. pp. 51 through 53). They promised Major Kingsley, President of Domestic and Foreign Commerce Corporation, and Mr. Ansberry, his counsel, the entire file would come to Washington for review



and that the officers of Domestic would have an opportunity to discuss the unwarranted position of the Dallas office here in view of the difficulty of communication with Dallas caused by the telephone strike. Nevertheless the respondent heard nothing from the officials of War Assets in Washington, despite repeated efforts to reach them, up to and including April 24th (Counter-affidavit of Kingsley, R. pp. 51 through 53). On April 24th, Mr. Ansberry was finally able to reach the Dallas office on the telephone, and was informed that the coal had been sold as of April 21st to the Midland Coal Company of Dallas for the same price, that the matter was closed and that although they had received Col. Larson's teletype requesting a review of the file, that Col. Larson "don't happen to be ruining our office" (*Id.* at R. p. 53). At this point Domestic and Foreign arranged for the filing of this suit and the obtaining of this temporary restraining order (R. pp. 35 and 36) herein issue, with all possible dispatch. It was only at that point, namely on April 29, 1947, that the representatives of Domestic and Foreign, despite continued previous attempts were able to discuss the matter again with counsel for War Assets.

The foregoing discussion of the conduct of the War Assets Administration is offered to the Court as showing the strong equities existing in respondent's favor.

Upon the filing of the complaint a temporary restraining order was issued. On the hearing of a motion for injunction pending trial the petitioner filed five minutes prior thereto a motion for dismissal of the complaint supported by two lengthy affidavits. (R., pp. 40 through 50).

The petitioner in his motion contended that the suit was in effect against the United States because title could not have passed to the respondent as alleged in the complaint; and that therefore the suit was in effect against the United States and failed to state a cause of action, due to sovereign immunity. In this, petitioner was sustained in the District Court. The Court of Appeals unanimously

reversed on the grounds first, that the allegation of title in the complaint had to be taken as true on motion to dismiss and, second, that if title was in the citizen, Sovereign immunity did not protect a government officer interfering illegally with the citizen's property. Therefore, said the Court of Appeals, correctly, we respectfully submit, the District Court should have taken evidence on the point of title before it could dismiss on the ground of sovereign immunity:

"In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk v. Glenn L. Martin Co.*, 4 Cir. 116 F. (2d) 865." 165 F. (2d) 236, 237.

Petitioner has not responded by answer to any of the allegations of the complaint. He has instead endeavored to make a motion to dismiss supported by affidavits serve the function of an answer. He has thus sought to deny the following plain allegations of the complaint: (1) title to the coal in respondent and (2) no breach of the contract of sale by respondent. This he seeks to do by affidavits and to exclude any response to the misstatement contained therein by procedural surprise (Thirty-one pages of pleadings filed five minutes before the District Court hearing). Comment of the Court of Appeals thereon is significant:

"The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled" 165 F. (2d) 235, 237.

(See footnote, No. 10 petitioner's brief, p. 13, seeking to exclude the reply contained in Kingsley Counter-affidavit and footnote 8, p. 12, *Id.*, disclaiming reliance on his affidavits after a lengthy use thereof in the body of his brief.)

Petitioner assumes the position he might have achieved by denial of some of the evidentiary facts in the complaint even though he has, in fact, demurred to the complaint and thus foreclosed the taking of any evidence on the points he now disputes. And now by petition for certiorari before a final order had been entered in the case petitioner seeks to prevent, by resort to sovereign immunity, a prompt inquiry into the facts by preventing a remand to the District Court.

While complaining of the urgency of getting on with the disposal of surplus, petitioner still seeks the further necessary delay of a hearing in this Court in order that he may, without warrant in law, prefer the second purchaser at the identical price over the first purchaser. And this even though the first purchaser is a pioneer in assisting the government in the disposal of surplus coal. This, even despite the risk of total loss of this coal by spontaneous combustion and the certain loss of part of its heating value by the passage of even more time.

The District Court (by Justice Jennings Bailey in a short oral decision) dismissed respondent's complaint. The Court of Appeals (Justices Clark, Wilbur K. Miller, and Prettyman) after four hours of argument (opinion by Justice Clark) decided against the petitioner in all of the various erroneous arguments raised by him. It is to be noted that this was the same bench that decided *Land v. Dollar* upon which petitioner argues nonconformity.

### **SUMMARY OF REASONS FOR DENYING THE WRIT.**

The Court of Appeals has unanimously and, we submit, correctly applied the salutary, recently reaffirmed, and ancient rule of *Land v. Dollar* and related cases; that, where the citizen alleges illegal interference by a government officer with the property of the citizen, the govern-

ment officer must answer; that if the alleged facts are true, there is jurisdiction; if not, sovereign immunity applies; and that therefore, the trial court must solve the impasse by making an adequate preliminary determination of these jurisdictional facts, if properly controverted; if admitted as they were by a motion to dismiss, sovereign immunity is absent on that state of the record.

No conflict between the circuits is claimed by petitioner, on this principle. The claimed conflict with prior decisions of this Court is erroneous.

No suit for specific performance is involved; a suit for specific performance is one to *obtain* title under a contract *to sell in futuro*; respondent alleged title in himself (petitioner has not denied, and in fact, petitioner's admission (Petition, p. 15) of the execution of the contract of *present sale* proves title in respondent); the only positive act petitioner might be required to do if asked, would be a purely ministerial one (i.e., load coal and collect money by presentation of documents against an irrevocable letter of credit) yet petitioner seeks to make this detail of everyday trade into a political act, so that he may confiscate unique property.

No final order has been entered below—petitioner may still set up his affirmative defenses by answer in District Court as he should have done originally.

The unsupported assertion that surplus coal is not unique in its "extraordinary license" value to exporters, contrary to the allegation of the complaint, and the plain finding of the Court of Appeals in accordance therewith, is, as an obviously correct ruling and as a matter unlikely to arise again, no ground for certiorari.

The rule of *Land v. Dollar* is one of general importance—but it has been too recently and plainly elucidated by this Court to justify further delay in violation of it for a mere reaffirmance on facts even more favorable<sup>1</sup> to the citizen

<sup>1</sup> The Dollar interests alleged only *equitable* title under a contract of pledge. Respondent alleged both legal and equitable title; and, like Dollar, were met only by a motion to dismiss.



plaintiff. No other principle of general importance is at stake in this case, and the correct decision of the Court of Appeals should go into effect at once, while this one ship-load of coal has greatest value to a cold world.

Petitioner then attempts to convert the instant case into a suit for specific performance "on the plaintiff's naked allegation that title has passed." The instant case is of course not a suit for specific performance and requests no compulsion. Even if this were the case it would be no proper objection inasmuch as mandamus issues against officers of the government to compel their ministerial non-discretionary acts in proper cases. As to the passage of title it is to be noted that respondent's pleadings contain their own irrefutable proof in the content of the four squares of the contract of sale itself and under the parol evidence rule petitioner could not deny the express provision of his own contract which he has already confessed by admitting the contract at page 15 of the petition itself.

At page 15 of petitioner's brief under the head of "reasons for granting the writ" petitioner erroneously attempts to read into the Court of Appeals' decision an interpretation that the Court of Appeals understood *Land v. Dollar*, 330 U. S. 731, as "overruling or disapproving prior decisions" of the Supreme Court. The error of this is shown by the language of the Court's opinion at 165 F. (2d) 236 "we have recently had occasion to scrutinize the doctrine of sovereign immunity as a 'jurisdictional problem' (*Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307, affirmed 330 U. S. 731, 67 S. Ct. 62) and in doing so we deemed it expedient to adopt the careful analysis which had been made previously by Justice Stephens of this Court in his opinion 'dissenting in part, concurring in part' in *Franklin T. P. in Somerset County, N. J., v. Tugwell*, 66 App. D. C. 42, 85 F. (2d) 208."

## ARGUMENT.

Under 1(a) of his reasons for granting the writ (Pet. p. 15), petitioner asserts that the coal is the property of the United States, then inconsistently admits "that the United States duly entered into a conventional sales contract disposition," thereby admitting that the coal in question is *no longer the property of the United States* but rather that it *was* disposed of to the respondent. At the top of page 16 the petition reads "that respondent having failed to fulfill its contractual obligation by a single cash payment thereby breached the agreement." But the petitioner makes no reference to any such provision in the contract. There is none; the provision is "*cash on presentation of railroad weight tickets as shipped*" (R., p. 15) (italics supplied). The "single" (advance) "payment" incorrect statement of fact has already been fully argued and overruled at the Court of Appeals hearing. Respondent's duty was simply to pay for the coal when invoices were presented. Since 10,000 tons is several trainloads of coal, it is obvious a single payment could not be made. Respondent is now, and always has been, ready to meet invoices as presented.

Even if the suit had requested positive action, it would not request specific performance of a contract to sell requiring a passage of title by the United States or any executive act requiring discretion, but merely would request that the War Assets Administrator as an individual be compelled to carry out his ministerial duty to load respondent's coal.

"Specific performance" in the ordinary legal sense of the term means specific performance of a contract to sell, i.e., an order of the Court compelling the transfer of title as promised in the contract to sell. The situation here is as urged above, a present sale at the time of making the contract. Hence, there is no need to have specific performance because title has already passed. Even if respondent had only equitable title legal title could be compelled in the

same manner that this Court has many times held it could be in Land Department (Interior) cases.

The only specific performance, and that not in the legal sense of the term, which could be requested, and it has not been requested in the complaint, is performance of petitioner's ministerial duty to load respondent's coal on the cars. The only relief which respondent has requested in his complaint is that the Court prevent delivery of his coal to others by the wrongful act of petitioner. Respondent assumes that if petitioner were enjoined from delivering to others petitioner would desire to carry out his ministerial duty to load the coal as thus suggested for him by legal process.

However, the duty to load the coal when and if asked or directed would be purely a ministerial one. A mandamus to perform a ministerial duty does not violate sovereign immunity. *Kendall v. United States*, 12 Peters 524 (1838).

Again, petitioner states "... the Government, for its part, claimed both that respondent was in default and that full title remained in the United States" (Petitioner's brief, p. 16). Nowhere in the record is there any appearance of or pleading by the United States. Nor is there any answer in the record asserting these affirmative defenses. The only claim by Littlejohn as an individual is in the form of affidavits of Lennon and Day on which petitioner asserts (by footnote No. 8, p. 12 of Petitioner's Brief) he does not rely, and on which he has no right to rely. They contradict plain allegations of fact in a complaint to which he has demurred.

I(b): Petitioner urges (p. 17 of Petition under 1(b)) that respondent is attempting to compel the War Assets Administrator as an official of the United States to perform its contract by officially ordering his subordinates to load the 10,000 tons of coal.

Petitioner is in error. It is not respondent who seeks to compel this, it is the law of the United States and it is the action of the petitioner himself which compels it. Peti-

tioner validly *disposed* of the property in question which he admits he had full power and authority to do. Having done this, and the coal having become by and under law the property of the respondent, he is bound under law to respect the property rights of the respondent just as any other citizen would be.

The cases cited by petitioner in his I(b) are discussed in our section I(c) *infra*.

I (c): The Court of Appeals pointed out, in disposing of petitioner's sweeping claim of immunity:

"All will concede at the outset that a court has no jurisdiction of a suit against the United States to which the United States has not consented. *United State v. Sherwood*, 312 U. S. 584, 587, 61 S. Ct. 767, 85 L. Ed. 1058. That is a ruling doctrine which has long been accepted, as the case cited demonstrates. However, since legal irresponsibility of the Federal Government is derived only by implication from the Constitution, the doctrine has received judicial delimitation which is well established. *United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171. Therefore, although we may observe that the War Assets Administration functions only as an agency of the United States, it must also be noted that '... the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 388, 59 S. Ct. 516, 83 L. Ed. 784." 165 F. 2d 235, 237.

Petitioner's footnote on *Goldberg v. Daniels* might create a misunderstanding of the record in that case. Footnote 13, Petitioner's Brief, p. 19:

"The petition for writ of mandamus in *Goldberg v. Daniels*, *supra*, alleged (R. 4, No. 79, Oct. T. 1913): '13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser *Boston* to him.'"

is correct so far as it goes but omits to state that the citizen's allegation of title was met by a direct denial by an-



swer to the rule to show cause, setting up title in the United States, and that the citizen plaintiff then demurred to this affirmative pleading by the Secretary of the Navy—*Sub nomine United States ex rel. Goldberg v. Meyer*, 37 App. D. C. 282, 286.

In that case, Goldberg alleged that he was high bidder under a statutory sale of a warship which the Court of Appeals interpreted to be for all practical purposes an ordinary auction sale, i.e., one not stated to be without reserve:

"The statute under consideration does not, in terms, declare that a vessel when offered for sale shall not be withdrawn, but shall be declared sold to the highest bidder, regardless of conditions that may arise after advertisement rendering it important to reconsider the decision to sell, and to retain the vessel for the uses of the government; nor can we interpret it so to mean. All that it commands is that the vessel shall be offered for sale in a particular manner, and that 'any vessel sold, shall be delivered to the purchaser.' Congress might have directed the sale to be made at public auction to the highest bidder, instead of through written bids to be opened upon the advertised date. Had that been done, it could not be successfully contended that the sale at such auction would be complete *until the acceptance of the highest bid*. It is settled law that an auction sale, whether made by a private owner or by an officer under execution of a decree, is not complete until the bid shall have been accepted, and the property struck off and declared sold to the bidder. The seller may decline to accept the bid, and may withdraw the property from sale. *Until acceptance of his bid, the bidder acquires no title to the property. Blossom v. Milwaukee & C. R. Co.*, 3 Wall. 196-206, 18 L. ed. 43-46. We perceive no difference between a sale made at public outcry, and one made in the manner prescribed by statute. In each case it is an offer for sale to the highest bidder, and no sale is made until the bid is accepted." (Italics supplied.) *Id.* at 286.

He was met by an answer on the part of the Secretary of the Navy, which set up this affirmative defense:

(1) the offer had not been accepted; (2) title was therefore in the United States. *Goldberg* then demurred, thereby admitting he had no title and that title was in the United States. The Court of Appeals quite properly affirmed the overruling of *Goldberg's* demurrer.

The Court of Appeals made quite clear that, had the state of the record placed title in *Goldberg*, mandamus would issue; but that since "no sale was actually made" (*Id.* at 289) title was in the United States, and sovereign immunity applied.

The abbreviated opinion of this Court is entirely in accord, carefully pointing out that the United States, on the state of the record, was the "owner" (231 U. S. at 287; 288), and therefore the military discretion feature also mentioned by the lower Court need not be the sole basis of decision.

*O'Harra v. Littlejohn*, relied on by petitioner at p. 18 of his brief, is a correct application of *Goldberg v. Daniels*, in that it involved the rejection of a high bid on the ground the bidder was not entitled to veteran's priority, and hence no sale had taken place, and the United States had title.

The recent local case of *Palmer Bolt & Nut Co. Inc. v. Littlejohn* in the U. S. District Court for the District Court (unreported as yet), is more in point. *Palmer* alleged title under a contract of sale to certain goods possessed by *Littlejohn*. Justice Pine correctly ruled that this issue on the merits controlled the jurisdiction, and therefore, following the rule in *Land v. Dollar* set the case down for hearing on the merits, and denied dismissal on motion to dismiss.

Petitioner then questions (at p. 20, brief for petitioner) the importance of title in the premises. Title, of course, is the basis of and has countless consequences in the law of sales. *United States v. Lee* turned specifically on "technical doctrines of passage of title." The army officers there involved claimed under a void tax deed.

*Goltra v. Weeks*, and *Pennoyer v. McConnaughy*, cited by petitioner, are cases where, after passage of title, officers were mandamusable to complete ministerial acts of delivery.

It is, of course, well settled that the mere fact that the United States is not a formal party to the record would be of no importance if the substantial effect of the decree were to be against the dominant interest of the sovereign. Petitioner erroneously concludes that this case involves forcing the executive discretionary act of a political officer of the United States where of course the dominant interest of the sovereign is on the side of non-interference.

On the contrary, this case is on all fours with *Land v. Dollar* (and, in fact, is stronger than *Land v. Dollar*—the Dollar interests alleged only equitable title, whereas respondent here shows both equitable and legal title) where the dominant interest of the sovereign was to protect the victim from wrongful interference with his property. Respondent has shown his legal title to the coal in question derived from the War Assets Administrator by his action in conformity with the Surplus Property Act. Having sold under his statutory authority, he is bound to deliver (a ministerial act) under his correlative statutory duty. This is a case like *Pennoyer v. McConnaughy* (Petitioner's brief, p. 17) where a disposal officer of the government in question has in fact entered into a sale and transferred title to the property and then refuses to complete final ministerial steps, which he was compelled to do. Respondent is not here contending that, had Littlejohn refused his offer for the coal, he would be in a position to compel the War Assets Administrator to enter into a contract. The fact remains that the Administrator did enter into a contract passing equitable and legal title.

The effort (Petitioner's brief, 20, 22) to distinguish *Dollar v. Land* on the argument that the Dollar interests had once had possession of the stock in question while we have never had possession of the coal in question was cor-

rectly overruled by the Court of Appeals after full argument. Since respondent has title under a contract of sale, he may maintain action for wrongful conversion and wrongful withholding. Petitioner's attempt to distinguish *Land v. Dollar*, *supra*, from this case may be due to a confusion of common law replevin with common law detainee. Section 66 of the Uniform Sales Act makes the following provision:

"Action for converting or detaining goods. Where the property in the goods has passed to the Buyer and the Seller wrongfully refuses to deliver the goods, the Buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld." Section 28-1504 D. C. Code (1940).

This restates the common law and present-day rule of action and specifically applied them to cases of the instant type. *Mechanics Bank of Alexandria v. Seaton*, 1 Pet. (26 U. S.) 299, 7 L. ed. 152; *Wiend v. Semkin*, 2 App. D. C. 425 (1894); *Logan v. Cross*, 101 Ore. 85, 198 Pac. 1097 (1921); *Rudin v. King-Richardson*, 311, Ill. 513, 143 N. E. 198 (1924).

1 ULA 368 (1931) contains the following comment in the form of the Commissioner's note:

"This section, which is not contained in the English Act, allows trover, replevin, equitable or other relief as the local law may warrant."

Moreover, *Land v. Dollar* did not turn on the fact of possession once at some distant time having been in the Dollar interests but on the fact that the Dollar interests had alleged title to the stock in question and the allegation stood undenied.

The renewed effort of the petitioner (Petitioner's brief, p. 15, 16, 17, 23) to apply patently distinguished cases where officials have terminated a contract for continuing services to the government, such as *Transcontinental &*



*Western Air v. Farley* and *Wells v. Roper*, was correctly denied below. Those are the very cases where the doctrine of sovereign immunity is unquestionably applicable on account of the right of the sovereign to select and dispense with his agents performing continuing sovereign functions such as carrying the mail. This principle is always distinguished from the equally well established principle of the law that the sovereign cannot gain title to any property except through legal means and cannot regain title by its own wrongful act. *U. S. v. Lee*, 106 U. S. 196; *Goltra v. Weeks*, 271 U. S. 536; *Land v. Dollar*; 330 U. S. 231, and allied cases.

The United States here has no interest in the proceedings. A duly appointed disposal official of the United States has disposed of United States property and the defendant remains as the mere bailee of the property in question. Under the allegations of *Dollar v. Land*, the United States was holding legal title and possession of the stock in question, subject to a contract of pledge.

Petitioner urges (Petitioner's brief, p. 24) that respondent's right to sue under the Tucker Act for breach of its contract rights eliminates respondent's right to sue for wrongful interference with its title and right to possession.<sup>1</sup> In *Dollar v. Land*, plaintiff had a right to sue in contract for breach of the contract of pledge, but, as here, it also had a right to enjoin wrongful interference with its title and right to possession.

There are many instances in the public lands cases where the Secretary of the Interior as disposal officer has been forced to carry out ministerial duties of perfecting plaintiff's land patent papers, once equitable title has passed. *Lane v. Hoglund*, 244 U. S. 175 (1917) is typical. Of course, on the other hand, if plaintiff has no equitable title man-

<sup>1</sup> The Court below went thoroughly into the equitable question of the unique nature of the coal and the irreparable damage deriving from the facts and witnesses of the case, which is not a valid reason for certiorari.

damus (forcing passage of legal title) will not issue. *Minnesota v. Hitchcock*.

*Perkins v. Lukens Steel Company*, 310 U. S. 113, has no application to the facts in this case. Respondent freely concedes that it could not have compelled the War Assets Administrator to accept its offer for the coal any more than the steel companies could compel the government to buy their steel. The War Assets Administrator was free to select those to whom he would sell. *He has exercised this right.* He has in fact sold to the Domestic and Foreign Commerce Corporation and completed entirely the exercise of his discretionary functions, as the Court of Appeals ruled.

The argument of counsel for the petitioner (page 22, petitioner's brief) that, if he is permitted arbitrarily to reclaim title which he has passed; at his pleasure, the disposal of surplus will thereby be speeded, is two-edged. Had the petitioner not determined to get out of this sale, the coal would now have long since been in Europe and burned. He would have paid in full and the matter would be at an end as in the case of the successful contract of 1946. On the other hand, if the petitioner is entitled to resist this suit under the cloak of his protection as an officer of the government, regardless of his wrongful attack on the plaintiff's property, then it is difficult to see why other prospective purchasers from War Assets will not be much discouraged. Billions of dollars of previous sales will be unsettled where the same contract forms were used.

The argument of the petitioner (page 22, petitioner's brief) that the speed of equity is at variance with the slow procedure provided for suits under the Tucker Act, is an objection which applied with equal force to *Dollar v. Land*, to the public land cases, and to all other cases where the citizen has a legitimate injunctive remedy against government officers exceeding their authority and interfering with citizens' property or possessions.

Petitioner makes the unsupported assertion "There has been no personal misconduct on petitioner's part"—*Id.* at 20. Apparently, petitioner overlooks "*respondeat superior*" and wishes to disclaim civil responsibility for the wrongs of his subordinates, the employees of War Assets. He cites for this, *Williams v. Fanning*, a case holding that a particular postmaster may be mandamus'd for illegal exclusion of matter from the mails, *as well as* the Postmaster General, in accordance with the correlative principle of agency that agent, as well as principal, is responsible for the agent's illegal acts.

II. Petitioner has not specified as error those points of local law (non-passage of title and breach) on which his general specification of error (sovereign immunity) is wholly dependent.

(a) The brief of petitioner proceeds throughout on the premise that the contract he entered into did not pass title. This overlooks a fundamental principle of the law of sales, namely that an "agreement to sell" passes title in the future whereas a "contract of sale" passes title at the time the contract is made. This was a contract of sale.

The complaint alleged that title had passed to the respondent and the Court of Appeals correctly ruled that this should have been taken as true.

This is so for three reasons. (1) The District Court had to accept conclusively the undenied allegations of passage of title (Complaint, Par. 12, R. pp. 6 and 7) in the complaint. (2) There was no evidence in the record for the Court to base a finding of non-passage of title. (3) Respondent was entitled to introduce evidence on the point of controverted, but was given no opportunity to do so.

Unless the complaint itself revealed facts which made impossible the passage of title, the Court below was bound on a motion to dismiss (which amounts to a demurrer) to treat the allegation as true.

It is well settled that the manifested intention of the parties governs the passage of title. On this question of

intention respondent was entitled to show "... the actual intent of the parties ... from the terms of the contract, the conduct of the parties, and all the circumstances of the case." (*Brown Lumber Co., Inc. v. Commissioner of Internal Revenue*, 59 App. D. C. 110, 35 F. 2nd, 880, 882.) *Electric Storage Battery Company v. District of Columbia*, 155 F. 2nd 867, 870 (1946), (App. D. C.). See also *Secor v. Tompkins Co.*, 45 A (2nd) 117 (D. C. Mun. App. 1946).

Therefore, respondent had a right to introduce evidence on the point of actual intention. He was entitled to an opportunity to be heard on the point of passage of title, and prove that the allegation of the complaint was in fact true. Yet the respondent was expected to reply to this point raised by the "speaking demurrer" denominated "motion to dismiss" on five minutes notice. Just as in *Land v. Dollár*:

"although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the *question of jurisdiction is dependent on decision of the merits.*" (Italics supplied.) 330 U. S. 731, 735.

Thus respondent was entitled to have his allegation of title taken as true since the question on the merits, whether title had passed to respondent, controlled also the question of jurisdiction.

Here the parties conclusively manifested that they intended that title should pass at the time of making the contract, as evidenced by the words of art used therein. This is conclusive and irrefutable proof that title to the coal did pass, as held by the Court below, upon the execution of the contract. Indeed petitioner would be precluded by the parol evidence rule from contradicting the express language of his own contract on the point.



The controlling legal principle in the law of sales is that the property in specific goods passes when the parties so intend. (D. C. Code 1940, Tit. 28, Sec. 1202).

"It must, therefore, constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely and will yield to proof of a contrary intention. Probably the statement of Benjamin, quoted with approval by the Circuit Court of Appeals, accurately sums up the matter. Slight evidence, says Mr. Benjamin, is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances." (*Williston on Sales*, 2d Ed. 1924, Sec. 280.)

The petitioner in his standard form denominated "sales memorandum" (Complaint, Exhibit E) has used words of art which from the earliest days of the law merchant have indicated an intention to pass title at once. This sales memorandum (Complaint, Exhibit D) contains no less than seven references to itself as a *contract of sale* or a *sale*. At no place in this document was there any reference to itself as a *contract to sell*. Since the early law merchant at the common law, going back to *Tarling v. Baxter*, 6 B. and C. 360, there has been a fundamental distinction between a sale *in praesenti* and a sale *in futuro*. It is an elementary proposition that contract of sale and contract to sell are words of art having definite and concise meaning as to the distinction between immediate passage of title and a mere agreement to pass title at some time in the future. The Uniform Sales Act has declared and restated this in unmistakable terms in Section 1 which appears at Tit. 28, Sec. 1101, D. C. Code (1940).

"(1) A *contract to sell goods* is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the 'price.'

"(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the 'price'." (Italics supplied.)

Language, and the holding, in *United States v. Amalgamated Sugar Company*, 72 F. (2d) 755 (C. C. A. 10th, 1931) are squarely in point:

"... each contract refers to the transaction as a sale, not an agreement to sell at a future time. That is persuasive." *Id.* at 757.

and further:

"Whether a contract is one of sale or one to sell depends very largely upon the intention of the parties. If they intend a present transfer of title it is a contract of sale; otherwise a contract to sell." *Id.* at 758.

The Court in that case thereupon concluded that title passed at the time of making the contract.

Petitioner seeks to avoid the words of art in his own contract. Even if doubt existed, his contract in case of ambiguity should be construed against him.

It is submitted that these words of art are certainly sufficient to support the specific allegation that title had passed against a motion to dismiss, and in fact conclusively show that title was passed to the Domestic and Foreign Commerce Corporation at the time of making the contract.

A case squarely in point is *Nashville Industrial Corp. and Technical Economist Corp. v. United States*, 71 Ct. Cl. 405 (1941). This case is also similar to the present one in that it involved surplus property disposal after the first World War. There was an attempt to contend that title had not passed to the purchaser. The contract read:

"The seller agrees to sell, and the purchaser agrees to purchase, the following described property at prices and on the terms hereinafter set out:

'Eighty-five (85) Werner & Pfleiderer, Type VI, size 15, Glass B. B. jacketed, mixing machines at a

unit price of six hundred fifty (\$650) each, *f.o.b. cars* Old Hickory, Tennessee, or a total consideration of fifty-five thousand two hundred and fifty dollars (\$55,250) for the eighty-five (85) machines. \* \* \* \*  
*Id.* at 406 (Italics supplied).

The Court ruled that title passed immediately to the purchaser showing that both under the common law and the Uniform Sales Act title had passed at the time of making the contract. The Court cited Rule I, *supra*, and used the following language:

"Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject can not be entertained if the terms of bargain and sale, including the price are explicit." *Id.* at 418.

"Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmore v. Supple*, 11 Moore P. C. C. 55, Benjamin, Sales (2d Ed.) 280; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Calcutta Co. v. DeMattos*, 32 Law J. Rep. N. S. Q. B. 322-338." *Id.* at 418.

"The contract we are considering relates to the sale and purchase of specific goods. The price is explicitly stated. The goods to be transferred are in a deliverable state, nothing remaining to be done to them prior to their delivery.

"We think the agreement was an unconditional contract of sale and that the title to the property sold vested in the vendee, the Technical Economist Corporation, upon the execution of the contract. There is nothing in any of the provisions of the contract which shows a contrary intent of the parties. \* \* \*. *Id.* at 418.

"Under the rule laid down by the decisions above cited, as well as by the plain and unqualified language of the Tennessee uniform sales law, the fact that the time of payment, or the time of delivery, or both be postponed, is immaterial as to the immediate passing of title to the buyer in goods sold under an unconditional contract of sale of specific goods in a deliverable state." *Id.* at 419.

II (b) Equitable relief is supported *inter alia* by unique value of surplus coal to exporters.

As alleged in the complaint:

"the plaintiff applied for . . . special export licenses outside the regular export allocation system of the United States government for newly mined coal, which were granted" (Complaint, par. 4 App. p. 2).

Thus, special additional allocations were granted to respondent's foreign purchasers last year for the export of surplus coal which would not have been granted for newly mined coal. Although coal by itself is a non-unique chattel, the further fact that it is surplus gives it a unique value in the eyes of exporters. This makes the case very similar to the ancient English case of the cowhorn which was the muniment of title by which the plaintiff held his land. Lord Keeper North ruled in this famous case, *Pusey v. Pusey*, 1 Vern, 273, 23 Eng. Reports 465 (1684) that defendant might be ordered to deliver up this horn. Plaintiff's ancestors held the land by "the tenure of cornage" that is, the blowing of this particular horn to alarm the country of the approach of the enemy. The horn, of course, in itself, was easily replaceable, but it had an extraneous unique value, and so, too, with this surplus coal, which has the extraneous value of being more easily licensed for export than other coal. The respondent, of course, can never obtain any surplus coal except from the petitioner. Respondent's re-purchasers, who want the coal solely for export, and who insist on surplus coal particularly, will not accept the substitution of other coal of a non-surplus kind. They



might never be able to export new-mined coal because non-surplus coal has at various times been held, by the export control authorities, essential to the American economy. Surplus coal furnishes foreign nations with an additional quantity over and above what they can obtain otherwise under the allocation system and is, therefore, to that extent, unique.

Respondent also had no plain, adequate and complete remedy at law because of (1) loss of trade reputation (2) damage would not be readily compensable, (3) part of the damage could not be measurable, and (4) it would cause risk of multiplicity of suits.

### CONCLUSION.

Wherefore it is respectfully submitted that the unanimous decision of the United States Court of Appeals for the District of Columbia was correct in law and that the petition for writ of certiorari in this cause should be denied.

SETH W. RICHARDSON,  
T. PETER ANSBERRY,  
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*Of Counsel:*

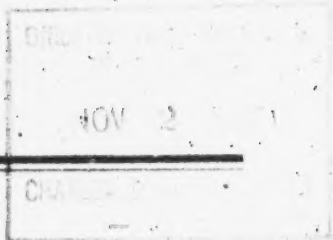
DAVIES, RICHBERG, BEEBE,  
BUSICK & RICHARDSON.

### **SUGGESTION OF FACT.**

Respondent wishes to suggest the following facts;

The petitioner entered two contracts of sale for the coal in question. The first was the contract to respondent involved herein and the second a later contract to the Midland Coal Company.

Since the Respondent's original brief was filed, respondent has entered an agreement with the Midland Coal Company whereby each party has agreed to exchange a one half interest in each other's contracts regardless to which party the petitioner delivers the coal covered by this proceeding. It therefore seems doubtful if a substantial issue remains, and the case may be accordingly held moot. The petitioner has heretofore indicated in the record his wish to make delivery under the Midland contract.



IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 31.

31

JESSE LARSON, as War Assets Administrator and Surplus  
Property Administrator, *Petitioner*

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR THE RESPONDENT.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

---

No. 31.

JESS LARSON, as War Assets Administrator and Surplus  
Property Administrator, *Petitioner*

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA

---

**BRIEF FOR THE RESPONDENT.**

---

**OPINIONS BELOW.**

The District Court of the United States for the District of Columbia (by Justice Jennings Bailey), dismissed respondent's complaint off the bench in an oral decision without opinion. The United States Court of Appeals for the District of Columbia Circuit (by Justices Clark, Wilken K. Miller, and Prettyman) reversed the dismissal upon opening, answering, and reply briefs, after hearing four hours of argument by counsel. The unanimous opin-



ion of the Court is reported at 165 Fed. 2nd 235 (Adv.); appears at page 55 through 59 of the record; and, for the convenience of the Court, is set forth in full in the Special Appendix, pp. 71-75, *infra*.

This was the same bench which decided the case of *Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307, upon appeal to that Court, which judgment was recently affirmed by this Court (330 U. S. 731).

## JURISDICTIONAL STATEMENT

The petitioner has invoked Sec. 240(a) of the Judicial Code.

## QUESTIONS PRESENTED.

(1) Whether a government official, duly authorized to dispose of government surplus, who has *disposed*<sup>1</sup> of surplus government coal of unique value by a binding contract of present sale; thereby conveying title to a citizen, may recapture title thereto by his own act of will, convert by resale at the same price, and thus confiscate the citizen's property wholly without authority in law; and

(2) When charged therewith by a sworn complaint, employ a *speaking demurrer denominated a motion to dismiss* to claim sovereign immunity by asserting, in surprise affidavits only and not by answer, an affirmative defense—title in the United States—in denial of the express allegation of the citizen's title in the sworn complaint, supported by exhibits, which plainly show a contract of present sale;

(3) Whether he may assert breach of the contract, also an affirmative defense, in the same way, without filing an *answer* or permitting an issue to be reached;

<sup>1</sup> Petitioner concedes at p. 25 of his brief that the coal here in question was disposed of by the U. S. which could only mean that the entire property interest had been conveyed to respondent although petitioner later seeks to attempt to withdraw his admission by an erroneous claim of breach.

(4) Whether an officer of the United States has authority to exceed his authority by "misconstruing" a citizen's title to his property, merely because title had once been in the sovereign United States.

(5) Whether a threatened future tort of conversion by government officer of a citizen's unique property cannot be restrained and prevented.

(6) Whether, in view of the *Lee—Land* line of authorities there is any difference between a wrongful withholding of possession and a wrongful seizure of possession.

(7) Whether a valid *disposal* or *sale* statute of the United States can be converted into a condemnation, confiscation, recapture or acquisition statute by the mere whim of an officer of the United States.

(8) Whether title to many billions of dollars worth of personal and real property formerly owned by the United States may be unsettled by wrongful retention or seizure of possession by an officer.

### STATUTES INVOLVED.

The applicable portions of the Uniform Sales Act are the definitions of contract of sale and contract to sell:

"(1) A *contract to sell goods* is a contract whereby the seller agrees to transfer the property in goods to buyer for a consideration called the 'price'.

(2) A *sale of goods* is an agreement whereby the seller *transfers* the property in goods to the buyer for a consideration called the 'price'."

(D. C. Code 1940) (Tit. 28, Sec. 1101) (italics supplied)."

The provision of Section 15 of the Surplus Property Act of 1944 Act of October 3, 1944, c. 479, 58 Stat. 765, 772-773, 50 U. S. C. App. 1624, is also included:

"SEC. 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to *dispose of property under this Act* then the agency

may dispose of such property by *sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper. . . .*

"(b) Any owning agency or disposal agency may execute such documents for the *transfer of title* or other interest in property or take such other action as it deems necessary or proper to *transfer or dispose of property* or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board." (Italics supplied.)

### PRELIMINARY STATEMENT.

This Court granted certiorari to the Petitioner Larson upon a petition which contained a representation of fact which was erroneous. "... respondent having failed to fulfill its contractual obligation to make a *single cash payment*" (p. 16 Pet. for Cert. # 649 October 1, 1947)

This mis-statement was called to petitioner's attention in no uncertain terms (Brief in Opp. to Cert). In acknowledgment of this error, he has now omitted it from his statement of fact. But he has erroneously included it in his argument upon which almost his entire third section of his brief is predicated:

"The complaint (including exhibits) discloses that respondent *breached the agreement* by refusing to deposit \$17,500 in cash with the designated Dallas bank and by insisting on *substituting payment* by means of a letter-of-credit, which seriously disadvantaged the War Assets Administrator and *did not comply* with the *contractual requirements*." (Pet. Brief, p. 23) (Italics supplied.)

"... and the Government refused delivery on the ground that respondent, having fulfilled its contractual obligation to make a *single cash deposit* in a Dallas bank, thereby *breached the agreement*". (Pet. Brief, p. 26.) (Italics supplied.)

"We think it plain from this recital that the parties' agreement was that respondent would deposit the *full*

\$17,500 *in cash* in the Dallas bank *before any* of the coal was shipped." (Pet. Brief, page 81). (Italics supplied)

Petitioner's new Statement of Fact, although omitting the mis-statement above referred to, includes confusing and disjunctive assertion. For which reason it is deemed necessary to restate the facts as follows in the Restatement.

### COUNTERSTATEMENT OF FACTS.

In early 1946, the Domestic and Foreign Commerce Corporation received notice that there was a large quantity of bituminous coal, located at various Army camps in Texas and adjoining states which had been declared surplus and for which the government had received no acceptable bids.

"The error of the petitioner's "Statement of Fact" is clearly revealed by (1) the recital of certain printed form provisions of his contract plainly rendered inoperative by other terms, notably (at p. 6, Pet. Br.) "*unless credit*" is provided for in the sales memorandum, payment must be made" etc. (italics supplied) despite the fact that credit plainly had been provided by Petitioner's acceptance of the contract on "your (respondent's) terms of placing \$17,500 with the First National Bank, Dallas, Texas, for payment *upon presentation of our invoices to said Bank.*" This was quoted directly above the other quotation at the same page (Pet. Br. p. 6). Inasmuch as the invoices could not possibly be presented until the coal had been loaded and shipped there could be no clearer way of providing credit. (2) Petitioner's recital of factual charges from affidavits filed in support of his Motion to dismiss the complaint but with a footnoted (No. 10, p. 13, Pet. Br) denial of reliance thereon. If no reliance was placed upon the affidavits why were they needlessly recited? (3) Petitioner devotes pp. 7 through 10 to a lengthy recital of the correspondence which passed between Petitioner and respondent after Petitioner decided to deny the effect of respondent's executed and binding contract in order to give respondent's coal to a later and persuasive purchaser who sought respondent's coal. This long recital merely demonstrates that respondent although under no contractual obligation to do so made a vain attempt to meet the constantly changing whim and caprice of the Petitioner, not realizing that it was in vain because Petitioner had decided to "unsell" the coal which the United States had validly sold and disposed of on March 13, 1947, over a year and a half ago.



The Domestic and Foreign Commerce Corporation purchased somewhat in excess of 100,000 tons of this coal (it pioneered in the field to the great benefit of the government) from the War Assets Administration at a price of \$1.75 per ton, which was far above other offers of only a few cents per ton. This coal had been in open storage for two years. Coal deteriorates rapidly under these conditions. It was located at points from which coal did not normally move to ports, and where, therefore, only high class rates existed. (Complaint, Par. 4, R. p. 2.)

The Domestic and Foreign Commerce Corporation arranged for the establishment of special low freight rates to ports, made an extensive market survey, and eventually succeeded in reselling the coal for export at a substantial profit. The Domestic and Foreign Commerce Corporation fully and completely complied with all the terms of its contract with the War Assets Administration and divided the coal fairly among foreign governments to whom the U. S. Government desired that it should go. The movement was of great assistance to the economy of Europe (Complaint, Par. 4, R. p. 2). Because the coal was government surplus, special export licenses were obtained over and above the regular allocations to the various countries. This of course gave this coal unique value to exporters. (Complaint, Par. 4, R. p. 2 and Par. 6 R.)

Early in March of 1947, the War Assets Administration offered an additional 10,000 tons to the Domestic and Foreign Commerce Corporation and this was purchased (Complaint, Par. 4, R. pp. 2, 3) through an exchange of letters and telegrams which are Exhibits A through E to the Complaint (App. pp. 10 through 30 incl.), as a continuing part of the previous contract.

War Assets then asked that a record of the contract be made on its form denominated "sales memorandum" which is Exhibit E to the complaint, which was done. The contract was made on the same terms and conditions as the previous contract and provided for the payment of cash, on sight draft accompanied by shipping documents, for the

coal f. o. b. cars at its location, the exact amount to be determined by railroad weights of the coal.

Domestic and Foreign promptly resold the coal (Complaint, Par. 5, R. pp. 2, 3; Exhibits A through E (R. p. 10 to 16) relying on its previous favorable experience with War Assets Administration and upon legal advice that the coal was specific, ascertained, and deliverable, and that, since the "sales memorandum" repeatedly referred to itself as a "contract of sale" and referred to the coal as "sold to", the Domestic and Foreign, title had passed to it. In the light of the successful experience known to both parties of the year before, it felt that it might with perfect safety resell to its customers. The coal was resold at a price of \$2.75 per ton plus a share of profit above \$1 per ton to the coal exporting firm known as the Penn Pocahontas Coal Company (a company closely allied to one that was used as exporter the previous year, namely the J. P. Routh Coal Company, whose officers and owners are substantially the same as Penn Pocahontas Coal Company (Complaint, par. 13, R. p. 7). Penn Pocahontas resold to the Portuguese government (Affidavit of Kingsley, R. pp. 33 and 34).

The Penn Pocahontas Coal Company promptly established an irrevocable letter of credit to pay the War Assets for this coal against shipping documents (Complaint, Par. 6, App. p. 4, Exhibits M and N, App. pp. 25, 26). The War Assets Administration which has solicited the bid, then, in a most unusual way, began to seek an out on its contract. The Dallas office of War Assets Administration began to insist successively that various details of the letter of credit were unsatisfactory to them (Complaint, Par. 6 through 9, R. pp. 4 through 6). Although the Domestic and Foreign Commerce Corporation had repeated changes made through the Penn Pocahontas Coal Company (Complaint, Par. 8, App. p. 5), to satisfy the wishes of War Assets in this respect, the War Assets Administration at Dallas, on April 16, 1947, late in the evening, wired the Domestic and Foreign that its contract was cancelled, and declined to respond to two telegrams and to answer one

telephone call attempting to determine the reason for the cancellation (Complaint Par. 10 and 11, R. p. 6).

Protest was made promptly (i. e., on April 18th) to the Deputy Administrator in Washington, General Mollison, and to the then General Counsel, Col. Jess Larson (Counter-affidavit of Kingsley, R. pp. 51 through 53). They promised Major Kingsley, President of Domestic and Foreign Commerce Corporation, and Mr. Ansberry, his counsel, the entire file would come to Washington for review and that the officers of Domestic would have an opportunity to discuss the unwarranted position of the Dallas office here in view of the difficulty of communication with Dallas caused by the telephone strike. Nevertheless the respondent heard nothing from the officials of War Assets in Washington, despite repeated efforts to reach them, up to and including April 24th (Counter-affidavit of Kingsley, R. pp. 51 through 53). On April 24th, Mr. Ansberry was finally able to reach the Dallas office on the telephone, and was informed that the coal had been sold as of April 21st to the Midland Coal Company of Dallas for the same price, that the matter was closed and that although they had received Col. Larson's teletype requesting a review of the file, that Col. Larson "don't happen to be running our office" (*Id.* at R. p. 53). At this point Domestic and Foreign arranged for the filing of this suit and the obtaining of this temporary restraining order (R. pp. 35 and 36) herein issue, with all possible dispatch. It was only at that point, namely on April 29, 1947, that the representatives of Domestic and Foreign, despite continued previous attempts were able to discuss the matter again with counsel for War Assets.

The foregoing discussion of the conduct of the War Assets Administration is offered to the Court as shown the strong equities existing in Respondent's favor.

Upon the filing of the complaint a temporary restraining order was issued. On the hearing of a motion for injunction pending trial the petitioner filed (five minutes prior

thereto) a motion for dismissal of the complaint supported by two lengthy affidavits. (R., pp. 40 through 50.)

The petitioner in his motion contended that the suit was in effect against the United States because title could not have passed to the respondent as alleged in the complaint; and that therefore the suit was in effect against the United States and failed to state a cause of action, due to sovereign immunity. In this, petitioner was sustained in the District Court (which filed no opinion). The Court of Appeals unanimously reversed on the grounds first, that the allegation of title in the complaint had to be taken as true on motion to dismiss and, second, that if title was in the citizen, sovereign immunity did not protect a government officer interfering illegally with the citizen's property. Therefore, the Court of Appeals correctly said, we respectfully submit, that the District Court should have taken evidence on the point of title before it could dismiss on the ground of sovereign immunity:

"In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk v. Glenn L. Martin Co.*, 4 Cir. 116 F. (2d) 865, 165 F. (2d) 236, 237.

Petitioner has not responded by answer to any of the allegations of the complaint. He has instead endeavored to make a motion to dismiss supported by affidavits serve the function of an answer. He has thus sought to deny the



following plain allegations of the complaint: (1) title to the coal in respondent and (2) no breach of the contract of sale by respondent. This he seeks to do by affidavits and to exclude any response to the misstatement contained therein by procedural surprise (Thirty-one pages of pleadings filed five minutes before the District Court hearing). Comment of the Court of Appeals thereon is significant:

The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled" 165 F. (2d) 235, 237.

Petitioner assumes the position he might have achieved by denial of some of the facts alleged in the complaint even though he has, in fact, demurred to the complaint and thus foreclosed the taking of any evidence on the points he now disputes. And now petitioner still seeks to prevent, by resort to sovereign immunity a prompt inquiry into the facts by preventing a remand to the District Court. Thus, while complaining of the urgency of getting on with the disposal of surplus, petitioner still seeks to prefer the second purchaser at the identical price over the first purchaser. And this despite the risk of total loss of the coal by spontaneous combustion and the certain loss of part of its heating value by the passage of even still more time.

### INTRODUCTION TO ARGUMENT.

Petitioner has treated the issue of title *vel non* in respondent as unimportant. Therefore he discusses it last.<sup>3</sup> But, in law and in fact, every point made in the first 86 pages of his brief logically depends on the fallacy of his major premise that the coal is not respondent's property. Yet he frankly admits he regards title as unimportant at p. 79 of his brief:

"Our entire argument as to sovereign immunity and as to equitable jurisdiction rests on the immateriality of respondent's substantive claims that title has passed

<sup>3</sup> Pet. Brief, pp. 86 through 94.

to it and that it duly performed its share of the contract. We believe that on both points it makes no difference whether title is now actually in the United States or in respondent . . . ."

However, respondent believes that its ownership of this coal is the very heart of the case. Accordingly, respondent will first discuss the issue of title, under Section A (B, pp. 21 to 33, *infra*, and thereafter will reply *seriatim* to the other arguments of petitioner, which all depend upon petitioner's assumption of the central issue of title.

### **SUMMARY OF ARGUMENT IN CHIEF.**

I. Respondent acquired legal title to its coal under a contract of purchase contemplated as the law of the land by both the Uniform Sales Act and the sovereign's disposal act. (Surplus Property Act of 1944.)

A. From the earliest day of the law merchant (*Tarling v. Baxter*, 6.B & C 360) whether passage of legal title is immediate under a contract transferring personal property, has depended upon the fundamental distinction between a "contract of sale" and a "contract to sell". Section 1 of the Sales Act in recognition and restatement thereof by definition has expressly provided for immediate passage of legal title under a "contract of sale." Petitioner, who drew the instant contract, expressly provided that it *was* a contract of sale and labeled it as such seven times therein. His claimed confusion of the two terms provided by law (by merging them into a conglomerate misunderstanding of meaning which he calls a "general sense") is difficult to understand from a skilled lawyer surrounded by eminently qualified professional talent. It is also rendered untenable because, as draftsman of the contract, petitioner resolved all doubt against himself. He cannot later cast his mistake upon an innocent party. Petitioner's own provisions in the contract for sales tax, stor-

age rental, resale for purchaser's account, etc., furnish conclusive reinforcement of the point.

B. Petitioner's motion to dismiss admits the immediate passage of legal title into respondent and this should have been taken as true (*Land v. Dollar*; *Zahir Erk v. Glenn E. Martin Co.*). Validity of the rule is well demonstrated in cases arising under contracts to sell where the issue is locating exact time of passage of legal title. There the mere presence of any term which might furnish one or more indicia of constructive intent does not preclude full trial of and inquiry into the ultimate fact of title. In the absence of expressed intention, time of passage of title is revealed by the actual facts proved at trial. The cases cited by petitioner, which establish only that legally or physically impossible allegations are not admitted, do not derogate from the rule that title is a well pleaded ultimate fact determination of which if contested is dependent upon all the indicia for constructing an intention. Its validity becomes most obvious in cases of the instant type where (like *Land v. Dollar*) "jurisdiction is dependent on decision of the merits".

C. It is unnecessary to refer to the rules for ascertaining constructive intent under Section 19 of the Sales Act, because there was an express provision of intention—"contract of sale" etc.—in the instant contract. Moreover, Section 19 by its own terms applies only to "contracts to sell". But even if the instant contract had been one "to sell", and therefore governed by Section 19, legal title would still have passed immediately upon execution of the contract because Rule 1 provides as to "specific goods" in a "deliverable state" that "the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." The petitioner does not and cannot deny that the goods were specific, ascertained, and deliverable and that under the contract both payment and delivery were postponed until after its execution.

D. Petitioner's application of the indicia of Rule 5 of Section 19 of the Sales Act to the instant contract, is forbidden by the express provision of the rule which by its very first term is limited to "If the contract to sell . . . ." Besides the contract did not oblige petitioner to deliver the coal to respondent because, under the contract, respondent was to pay all freight and transportation cost; the rule by its own terms is limited to exactly the opposite situation which "requires the seller to deliver the goods . . . or to pay the freight or cost of transportation to the buyer." Petitioner's further claim that title was retained because of "insistence on cash payment on or before shipment", is manifestly erroneous and impossible under the contract. It provides that payment be made only after presentation of railroad weight tickets. These tickets cannot physically be prepared until after the coal is loaded on the railroad cars and on its way. Under exactly the same language in previous contracts, of which this was expressly made a continuing part, petitioner often did not receive payment until weeks after shipment.

II. Even though respondent were dependent solely upon equitable title to the coal and even though it had sought the remedy of both specific performance and mandatory relief, it would have been entitled to prevail. This is well settled not only under the broad rules of property, contract and tort, enunciated by the *Lee-Land* line of cases but also within the much narrower rule of the sovereign disposal authorities. Once the United States disposes of unique property, equitable title passes to the citizen. Despite the sovereign's retention of legal title to real property (which, of course, is always unique), real ownership is transferred from the public domain to the citizen. Thus the citizen owner of lands, acquired under contract from the sovereign, is entitled to the jurisdiction of equity to enjoin officers of the United States from a wrongful cancellation of his binding contract with the sovereign, and is also entitled to mandamus them, upon its relation, in order to force



legal title out of the sovereign. The general rules of property and trust go beyond this; they specifically enforce a citizen's contract with the sovereign by allowing pursuit of unique property, acquired from the sovereign under contract, even into the hands of a second purchaser from the sovereign although admittedly the sovereign had legal title at the time of the second conveyance. There is no distinction in legal consequences between a sale of unique personal property and a sale of real property. The Sales Statute, going a step beyond this, expressly allows specific performance for specific, ascertained and deliverable personality, regardless of unique character; this climaxes a long-standing trend toward recognition of the purchaser as the real owner, entitled to all the rights and remedies of an owner; while the seller is properly treated as a mere dry trustee.

### SUMMARY OF REPLY ARGUMENT.

I. The basic error of petitioner's argument is, of course, reflected in his summary thereof beginning at page 16 of petitioner's brief. Under Point I-A (dedicated to the general proposition that this is an unconsented suit against the United States) he takes the following liberty with the relief sought by the complaint. At the second line thereof, he asserts, "respondent has sought to compel specific performance of its sales agreement with the United States." But not such relief has been requested under the terms and language of the complaint. This is directed against the person of the defendant to enjoin and prohibit him from taking any future illegal and unauthorized action with respect to respondent's property. The Complaint asks only the maintenance of *status quo*. It seeks no affirmative action of any kind, nature or description even against the person of the defendant much less against the sovereign United States.

This same assertion that respondent seeks specific performance is repeated dozens of times throughout the brief.

Even a cursory examination of respondent's complaint and prayer for relief would disclose that no affirmative relief is sought in any form, much less that of specific performance.

I. A. In the same sub-section (I-A) of his summary, petitioner quotes general language of this Court in other cases without attempting to show how, where, why and when the language of these other cases should apply to the facts. The error of this is obvious from the language quoted itself—for instance, he purports that this case aims to forbid an officer of the United States from "the doing of those things which, if done, would be merely breaches of the contract" by the United States. But the act sought to be prevented here, namely conversion of respondent's coal, is a tort. Petitioner urges that, since he has general authority to act for the United States in the disposal of surplus, that this authority cloaks with immunity conversion of a citizen's property if connected therewith. He claims that his duty to construe contracts for disposal includes authority to "misconstrue" the rules of property with immunity.

*Goldberg v. Daniels*, 231 U. S. 218, cited by petitioner as authority for this doctrine, nowhere purports to authorize the future commission of the tort by an officer and rests solely upon a finding that the property therein questioned belonged in fact to the United States on the state of the record.

This same sub-section, at both Pages 16 and 17, inferentially claims that the relief sought herein by respondent would compel the "War Assets Administrator in ordering his subordinates to load 10,000 tons of coal on freight cars in accordance with respondent's shipping instructions, and to accept payment as proffered by respondent." The relief prayed nowhere seeks such action.

Following that, at page 17, petitioner claims that respondent has argued that the suit is less one for specific performance because respondent "alleges that title to the coal has already passed to it." This involves a double error: (1) no specific performance has been asked and (2)

respondent urges its ownership rights against a proposed tort.

In sub-section B of Point I at page 17 of petitioner's summary of argument, petitioner urges that the *Lee-Land* line of cases do not control the instant case by assuming it is "an attempt to get specific performance of the contract to deliver property of the United States." Even if it had been specific performance against the United States and even were it conceded that the sovereign held legal title, this Court has repeatedly forced legal title out of the United States for the benefit of an equitable owner (See pp. 33 to 38, *infra*). The instant case, as noted *supra*, it is neither a suit for specific performance nor a case involving any property interest of the United States. By uncontested and well-pleaded allegation, as well as in fact, the coal is respondent's property.

Secondly, under this sub-section at page 17 he objects that respondent has not alleged that defendant is exceeding his "statutory or constitutional authority." The fact and allegations contained in the 5th, 12th and 14th paragraphs of the complaint (R. pp. 2, 6, 7) very clearly support the legal conclusion of an excess user of statutory authority—illegal conversion. Such a conclusion would not of course, have been well pleaded.

Under the next sub-section, I B, petitioner continues with the preposterous proposition that "contracting officials endowed with the breadth of statutory authority granted to War Assets Administration do not exceed their power when they misconstrue the terms of an agreement." In other words, petitioner rests his case upon the theory that a public official has authority to misconstrue the law of property; is thus authorized to exceed his authority with respect to other peoples property, even to the extent of committing the tort of conversion thereupon; and that his views of property law, even if wrong, are not reviewable by the Courts.

As his third point under sub-section B, petitioner argues that respondent has neither asserted nor could assert a

private common law tort against petitioner in its complaint. Again, the respondent has "made a short and plain statement of the facts" in the 14th paragraph of its complaint establishing the threatened conversion (R. p. 7). This clearly supports the conclusion of law that petitioner's proposed action amounts to a tort. But, again, no conclusion of law can be well pleaded.

Under this same third point, petitioner, admitting the tort for purposes of argument, seeks to cast it upon subordinates rather than himself regardless of the actual fact; that he not only participated in it himself but helped to cause it as respondent can show at trial under the complaint. In any event, the present petitioner continues and has reaffirmed the joint wrong of his predecessor and himself, since he substituted himself in this litigation on his own motion in this Court. He has also shown that he fully knew of the facts of this case by filing an affidavit in the Court of Appeals one year ago.

In a fourth proposition of this same sub-section B on page 18, petitioner erroneously seeks to create a new rule under the *Lee-Lund* cases, namely that before any citizen may protect his property rights from illegal invasion, he must have owned it for a long time and the United States must never have owned it at any time. A wrongfully continued possession is no more lawful than an illegal seizure. Compare *Land v. Dollar* with *United States v. Lee*. Also in the sovereign disposal cases (pp. 3 to 18 *infra*) in many instances the citizen *never* had possession, only the sovereign. Continuing in the same vein, petitioner undertakes an attack on the law of sales and the rules of property enunciated thereunder which have stood for thousands of years by characterizing them as "confusing" and "formal." Petitioner's attack on law so fundamental is clear revelation that the law is against him. At page 19 petitioner attempts to cloak his wrongful acts with the mantle of sovereign immunity, on the theory that any suit against him, a public officer, whether the suit be to prevent his wrongful acts or not, must necessarily involve the sovereign United States



merely because of his unpleaded assertion that he is acting in its behalf in claiming possession of respondent's property. Such argument must fail, inasmuch as the only interest the United States could have would be one in seeing its citizen's property protected and in seeing its wrongdoing officers prevented from committing illegal acts in its name. . . . "and in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process." *Philadelphia Co. v. Stimson*, 223 U. S. 620.

In sub-section C of Point I on page 19, after yet again erroneously assuming that this is a suit for specific performance, petitioner rests another erroneous assumption upon his first assumption; he asserts that this is a suit against the sovereign United States and that, therefore, it is "a suit directly involving the use, possession or title of property in which the Government claims an interest." But the Government has not claimed an interest here and is not even a party to this suit; and the petitioner personally (defendant below) *has not answered or made any assertion of title either in himself or on behalf of any third party, including the sovereign United States* (unlike the situation in *Goldberg v. Daniels*). Nor is there anything in the complaint which would even slightly suggest the possibility of title in the United States. The properly pleaded and undenied allegation of title in respondent stands unshaken.

Sub-section D on Page 20 of Point I is dedicated to general support of the doctrine of sovereign immunity, ignoring the established judicial delimitation thereof, short of a power of arbitrary condemnation or seizure. Petitioner's attempt to substitute money damages under the Tucker Act ignores the fact that partial money damages would have been similarly available in the *Lee-Land* cases and other cases delimiting the doctrine.

At sub-section E of Point I on Page 21 of petitioner's brief he attempts to argue that mandamus would not lie in the instant case. Inasmuch as no mandamus has been requested here, no reply need be made to this except to draw attention to the fact that even if mandamus had been

asked to deliver the coal in question, there could be no more ministerial or non-executive act than loading coal.

At page 22 under Point II, petitioner undertakes to show that respondent has no right to equitable relief. His argument that the particular coal in this case is not unique on the pleadings is not only incorrect on the record (as the Court of Appeals has held); but it is a question of fact which has yet to be tried; and upon which respondent as yet has been denied the right to introduce its overwhelming evidence on the point because of the petitioner's speedy motion to dismiss. Since the rule of *Land v. Dollar* prevents petitioner from pleading facts in an affidavit accompanying a motion to dismiss, he has now adopted the unprecedented device of pleading allegations of fact in his brief, and in support, he offers hearsay.

Petitioner also pleads in this same paragraph that the respondent's damage can be calculated in terms of re-sale contracts. This overlooks the fact that, although a portion of the loss is measurable and therefore compensable in damages, a great portion of it is not. For this reason, a large portion of the damage is irreparable. Petitioner attempts reply neither to the irreparable nature of loss of trade reputation and good-will, nor to the multiplicity of suits necessarily involved should the tort be allowed to occur. His argument that the Court of Appeals has forfeited him of a trial of the fact of uniqueness is wholly imaginative inasmuch as the Court's decision was, by necessity, based only upon the pleadings before it (the complaint and motion to dismiss). The Court's judgment plainly remanded the cause to the District Court for a trial of all the facts.

Under Point III at page 23, petitioner seeks to argue the unpleaded answer that respondent breached its contract. The entire argument is premised upon petitioner's unsupported assertion of fact, namely that "the complaint (including exhibits) discloses that respondent breached the agreement by refusing to deposit \$17,500 in cash with the designated Dallas Bank." Respondent was only required under the terms of the contract to make payments of cash

upon presentation of invoices and weight tickets as the coal was shipped. Respondent's terms of providing money only in time to cover these invoices of shipments were accepted in clear and unmistakable language by petitioner. He must of necessity have understood this from the previous contracts, which were specifically made a part of this contract, and under which previously that *very* same method of remittance had been used.

Complete ownership and legal title to the coal passed *instantly* into respondent by operation of law at the execution of the contract. Credit was provided. The indicia of title recited by petitioner have no application to a *sale or contract of sale (in presentia)*. Under the language of the statute, they apply only to *contract to sell* where legal title is to pass at some unspecified date *in futuro*. Even if this had been a *contract to sell* instead of a *contract of sale*, (as expressly provided seven times in the contract), the indicia of intention would still have passed legal title. Petitioner's enumerated indications of intention are erroneous as follows:

He argues "Insistence on cash payment on or before shipment." But payment was to be made and could be made only after shipment.

He urges "The inclusion of an f. o. b. shipping point term." This is rendered meaningless by the shipping point being one and the same as the origination point rather than some intermediate point. Moreover, the term could aid constructive intent only in a "Contract to Sell" which this was clearly not by express provision of the contract, making it a "Contract of Sale."

He urges "The distribution of risk so that the Government bore the risk until timely shipment." The only provision was a limitation of risk, not an assumption thereof, and one equally useful whoever bears ownership risk, since in any event it limits their risk from negligence or fault.

An express provision assuming general risk in the contract, would merely indicate an abnormal shift of risk as, without it, risk would have been on the purchaser.

He urges "The word *sale* or *contract of sale*" was used in a loose commercial "general sense." But words of legal significance and connotation in a formal document can only be accepted in the legal sense in which they were used, namely, immediate passage of title, and could never be used in some "general" sense, which meaning would be exactly contrary to their definition by statute, which would defeat the automatic operation thereof.

## A. ARGUMENT IN CHIEF.

### I. Respondent Has Title to the Coal.

- A. The parties have conclusively manifested an intention that legal title should pass instantly at the time of making the contract, as evidenced by its express words of art defined expressly in Section 1 of the Sales Act.

The petitioner in his standard form denominated "sales memorandum" (Complaint, Exhibit E), has used words of art which from the earliest days of the law merchant have indicated an intention to pass legal title instantly. This sales memorandum (Complaint, Exhibit D) contains no less than seven references to itself as a *contract of sale* or a *sale*. At no place in this document was there any reference to itself as a *contract to sell*. Since the early law merchant at the common law, going back to *Tarling v. Barter*, 6 B and C 360, there has been a fundamental distinction between a sale *in praesenti* and a sale *in futuro*. It is an elementary proposition that "contract of sale" and "contract to sell" are words of art, having definite and concise meaning, used habitually to distinguish between immediate passage of title and a mere agreement to pass title at some time in the future. The Uniform Sales Act has declared and restated this in unmistakable terms in Section I which appears at Tit. 28, Sec. 1101, D. C. Code (1940).

(1) A *contract to sell goods* is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the 'price'.



"(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. (Itaries supplied.)

Language, and the holding, in *United States v. Amalgamated Sugar Company*, 72 F. 2d 755 (C. C. A. 10th, 1931) are squarely in point:

"Each contract refers to the transaction as a sale, not an agreement to sell at a future time. That is persuasive." *Id* at 757.

There could be no clearer method of determining whether a contract of sale or a contract to sell was intended by the parties than examining their contract to see what those parties expressly provided therein. The Court concluded that title passed at the time of making the contract.

Petitioner now claims that he employed these words of specific, technical and definite legal meaning in the contract in a loose commercial or "general sense" (p. 92, Pet. Brief). It is difficult to believe that petitioner, a lawyer himself, and the then general counsel of the War Assets Administration, where he would naturally be surrounded with skilled legal draftsmen, would not know the difference between a "contract to sell" and a "contract of sale." But this is beside the point, inasmuch as he cannot now cast the fault of his mistake (or ignorance of the law) upon an innocent party. Even if any doubt existed, his contract, in case of ambiguity should be construed against him, inasmuch as he drew it. Moreover, he has accompanied "contract of sale" consistently with other language indicative of intention to make a present sale. The face of the sales memorandum itself (R. p. 15) bears the words "sold to Domestic and Foreign Commerce Corporation." Furthermore there is on the face of the document a space for the insertion of the sum due from the purchaser denominated "sales tax." Are we to assume that a sales tax would be due on a mere contract to sell in future? Thus by the use of words of art, stronger than any used in *United States v. Amalgamated*

*Sugar Company*, 72 F. (2d) 755, (C. C. A. 10th, 1931), the petitioner passed title to the respondent, Domestic and Foreign Commerce Corporation. The intention of the petitioner was clear and unambiguously expressed. The Sales Statute operated upon his language immediately and instantly put legal title into respondent. This conclusion is reinforced by his right (No. 1 of the conditions of sale), to "*store the property elsewhere for the account and at the expense of the purchaser*"; also "to demand the payment of reasonable storage charges." A further indication of the intention of the War Assets Administrator is the right he has reserved to "*resell*" the property in question "*for the account of purchaser*" under certain conditions (middle-of-par. 7, Exhibit 7, R. p. 16). If no sale has taken place there can be ~~no~~ re-sale.

It, despite all this, there were any ambiguity of intention we urge that this is a contract drawn by defendant. It should be construed against him even if there had been ambiguity.

It is submitted that these words of art are certainly sufficient to support the specific allegation that legal title had passed against a motion to dismiss, and in fact conclusively shows that title was passed to the Domestic and Foreign Commerce Corporation at the time of making the contract.

**B. The complaint alleged that title had passed to the plaintiff and this should have been taken as true.**

As the Court of Appeals correctly ruled (R. p. 57) the allegation of title had to be taken as true on motion to dismiss in the premises. *Tahir Erk v. Glenn L. Martin Co.*, 116 F. 2d 865 (4 Cir). Petitioner argues that the sales memorandum, a part of the complaint, had terms implying the contrary, i. e., a "contract to sell" (Pet. Brief, pp. 86 through 91) and that, for this reason the specific allegation should be disregarded.

This is erroneous. First, as we have shown, *supra* (p. 21) the terms of the sales memorandum conclusively place legal

title in respondent. But even if this were not so, and assuming merely equitable title for this phase of the argument, much probative evidence, often outside the contract itself, may be admissible before the ultimate fact of exact time of passage of legal title may properly be determined. In all these cases which involve unique property equitable title is unquestionably in the buyer and the only issue joined is determining time of passage of legal title in order to distribute risk of loss. In these "contract to sell" (in futuro) cases it is well settled that the intention of the parties governs the passage of title. On the issue of exact time of passage of legal title if controverted, a party is entitled to show "... the actual intent of the parties ... from the terms of the contract, the conduct of the parties, and all the circumstances of the case." (*Brown Lumber Co., Inc. v. Commissioner of Internal Revenue*, 59 App. D. C. 110, 35 F. 2d 880, 882 (1929)). The mere presence of any given term should not preclude inquiring into the ultimate fact of title.

"Neither the presumption created by Rule 5 of the Uniform Sales Act nor the accepted connotation of the term 'f. o. b.' can, of itself, control the result. The prepayment of freight and the use of the term 'f. o. b.' are only two of the facts to be given consideration in determining the time and place at which the parties intended to pass title. The answer, as we have seen, must be found in other facts showing the actual intention of the parties." (*Electric Storage Battery Company v. District of Columbia*, 155 F. 2d 867, 870 (App. D. C. 1946)).

See also *Secor v. Tompkins Co.* 45 A (2d) 117 (D. C. Mun. App. 1946).

It is for this reason that an allegation of title is well pleaded, amounting to an allegation of ultimate fact. In re *Noble*, 21 F. Supp. 840 (D. W. D. N. Y. 1937). *McAllister v. Kuhn*, 96 U. S. 87 (1878).

Cases cited by respondent (Br. p. 87) do not derogate from this well known rule. Some are cases of absurd allegations known to be impossible under the doctrine of ju-

dicial notice: e. g., in *Nortz v. United States*, 294 U. S. 317, an allegation that monetary gold had a market value of X dollars per ounce, when there was no legal market for such gold in the United States; in *United States v. John J. Fetip and Co. Inc.*, 334 U. S. 624, that the "replacement value" of an item was in excess of the maximum legal price at which it could be sold under OPA. Some are, e. g., *Newport News Shipbuilding Co. v. Echaumer*, an allegation of a pure conclusion of law "Plaintiff not engaged in interstate commerce."

But an allegation of title, as we have shown, has long been well settled to be a well-pleaded ultimate fact, neither impossible nor so presumptive of the court's legal analysis of the facts as to amount to a conclusion of law. It is, indeed, an ideal allegation for the purpose of reaching a triable issue.

Just as in *Land v. Dollar* (Sup. Court, U. S. No. 207, O. T. 1946, decided Apr. 7, 1947):

"Although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits."

Thus respondent was entitled to have his allegation of title taken as true since the question on the merits, whether title had passed to respondent, controlled also the question of jurisdiction.

**C. Only if the parties had not previously expressed their intention of making a present sale would it be necessary to have reference to the rules of constructive intent provided in the Uniform Sales Act, but even in that event Rule I of Section 19 clearly indicates that legal title passed at the time the contract was made.**

It seems to the respondent entirely unnecessary to refer to the rules provided at common law and restated in the Uniform Sales Act for the ascertaining of constructive intent as to the passage of title because intent already had



been clearly expressed. As outlined above the words of art (defined in Sec. I of the Uniform Sales Act, D. C. Code, 1940, Tit. 28, Sec. 1101) used by the appellee in its contract reveal an expressed actual intent to effect a present sale rather than a contract to sell. Even if reference is had, however to the laws of ascertaining constructive intention as to exact time of passage of legal title, where none is expressed, rule 1 provides:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where is an unconditional *contract to sell* specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." (Tit. 28-1203, D. C. Code, 1940). (Italics supplied.)

It is to be noted that the italicized provision of the section make it applicable to only "contracts to sell." But even if a contract to sell title would have proved upon execution of the contract here.

A case squarely in point is *Nashville Industrial Corp. and Technical Economist Corp. v. United States*, 71 Ct. Cl. 405 (1941). This case is almost amazing in its similarity to the present one in that it involved surplus property disposal after the first World War. The government was attempting to contend that title had not passed to the purchaser. The contract read:

"The seller agrees *to sell*, and the purchaser agrees to purchase, the following described property at prices and on the terms hereinafter set out:

"Eighty-five (85) Werner & Pfleiderer, Type VI, size 15, Glass B. B. jacketed, mixing machines at a unit price of six hundred fifty (\$650) each, *f.o.b. cars* Old Hickory, Tennessee, or a total consideration of fifty-five thousand two hundred and fifty dollars (\$55,250) for the eighty-five (85) machines. \* \* \* \*"  
*Id.* at 406 (Italics supplied.)

The Court ruled that title passed to the purchaser from the government showing that both under the common law and the Uniform Sales Act title has passed at the time of making the contract. The Court cited Rule I, *supra*, and used the following language:

"Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject can not be entertained if the terms of bargain and sale, including the price are explicit." *Id.* at 418.

"Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmore v. Supple*, 11 Moore P. C. C. 55, Benjamin, Sales (2d Ed.) 280; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Calcutta Co. v. DeMattos*, 32 Law J. Rep. N. S. Q. B. 322-338." *Id.* at 418.

"The contract we are considering relates to the sale and purchase of specific goods. The price is explicitly stated. The goods to be transferred are in a deliverable state, nothing remaining to be done to them prior to their delivery.

"We think the agreement was an unconditional contract of sale and that the title to the property sold vested in the vendee, the Technical Economist Corporation upon the execution of the contract. There is nothing in any of the provisions of the contract which shows a contrary intent of the parties. \* \* \* *Id.* at 418.

"Under the rule laid down by the decisions above cited, as well as by the plain and unqualified language of the Tennessee uniform sales law, the fact that the time of payment, or the time of delivery, or both be postponed, is immaterial as to the immediate passing of title to the buyer in goods sold under an unconditional contract of sale of specific goods in a deliverable state." *Id.* at 419.

The coal in this case constitutes specific, ascertained, and deliverable goods described as:

"Stove size, mined near Henryetta, Oklahoma; mining company, moisture content, volatile matter fixed carbon percent, ash percent, B. T. U.'s per pound and ash fusion temperature are unknown. Stored outside on ground in three windrows, for approximately three years, adjacent to a switch track of Frisco line."

in the petitioner's original letter of invitation (Exhibit A of the complaint, R. p. 10).

**D. Petitioner's claimed indicia of time of title passage are without merit because they can neither repeal nor override Section 1 or 19 of the Act.**

Petitioner relies upon three points as indicia of his title to overcome this showing of title in respondent and the plain undenied allegation thereof (p. 91, Brief for Petitioner).

These are: (a) The Free on Board provision of the contract, and an erroneous belief that *any* Free on Board provision retains title regardless of other factors; (b) claimed risk of loss on seller; (c) the claimed (and as we have shown, *infra*, pp. 69-70), erroneous terms "cash in advance of shipment."

Rule 5 of the Uniform Sales Act, on which petitioner relies for his F. O. B. argument provides:

"*If the contract to sell require the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. (Mar. 17, 1937, 50 Stat. 33, ch. 43, Sec. 19).*" Tit. 28, Sec. 1203, D. C. Code (italics supplied).

Petitioner contends that the provision in the contract for loading "f. o. b." cars (here *at location*) is sufficient to bring this contract within the situation contemplated by

Rule 5. Two errors should be noted, however. The first is that Rule 5 is specifically limited by its own terms to a "contract to sell." A contract to sell is defined in the very beginning of the Sales Act, Tit. 28, Sec. 1101, D. C. Code, 1940, as:

"(1) *A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the 'price'.*" (Italics supplied.)

Thus it may be seen that Rule 5 never becomes applicable until you first determine (e. g., because the goods involved are future goods) that a sale has not taken place earlier in the negotiations. In other words, the use of Rule 5 by the petitioner assumes the very point to be proved, namely the sales memorandum was not a present sale but a contract to sell at a future date. The very purpose and utility of Rule 5 is to take care of the situation where title has not passed at the time of making the contract and to provide a convenient cut-off point *where the parties have not expressed themselves* as to the exact point in the future at which title shall pass in making their contract to sell.

The second error is a confusion of F. O. B. location contracts with other F. O. B. contracts.

*Whitney on Sales* (3rd Ed. 1941) Secs. 75 and 91, clearly explains that Rule 1 controls in a supposed conflict with Rule 5 in f. o. b. location contracts for specific goods (as distinguished from f. o. b. *destination* or *intermediate* place contracts) in the following language:

From Sec. 75:

"The apparent contradiction between the two sections," (Rule 1 and Rule 5) "may be removed by construing the term 'delivery' in Rule 1 to cover the case where the buyer is taking delivery from the seller's place of business, the transportation being made by the buyer, and by construing the term 'delivery' in Rule 5, to cover the case where the seller is to transport the goods from his place either to the buyer's place or to a place named by the buyer."



From Sec. 91<sup>9</sup>

"The letters f. o. b. stands for the words 'free on board' and means that the seller is to put the goods on board cars or boat for the buyer without any expense to the buyer such as cartage lighterage, stevedoring, etc.—and that thereafter the buyer is to bear the cost of transportation to the point of destination—in other words that the buyer must pay the freight. Under a contract to sell f. o. b. point of shipment, it is no part of the seller's duty to prepay the freight, *therefore* the provision of Rule 5 does not apply to f. o. b. shipping point contracts." (Italics supplied.)

Petitioner states: "It is one of the guiding rules of sales law that, absent of contrary intention expressly appearing, a provision for delivery f. o. b. point of shipment is the strongest evidence of intention to pass title to the buyer at that time, *and not before*, the goods are delivered by the seller to the carrier and placed on board the freight cars." (Italics supplied.) Pet. Brief, p. 88.

His cases stand for the reverse: That title passes *not later* than the f. o. b. point. His misapprehension must arise from a hasty reading of the cases which he cites. Most of them contain general language to the effect that title passes at the f. o. b. point. What has been overlooked is that they fall into two classifications: (1) future or unascertained goods cases and (2) loss in transit cases.

In the first type, namely cases where the goods were future or unascertained at the time of the contract, title manifestly cannot pass until specific goods are appropriated to the contract—e. g., a sale of coal by description of grade. The second type consists of f. o. b. shipping point *loss in transit cases*, such as *Ehrenberg v. Guerrero*, and *Nelson Brothers Coal Co. v. Perryman-Burns Coal Co.* In a loss in transit case, no party has any interest in proving that title passed at any time prior to the f. o. b. point. It is sufficient for seller that title pass f. o. b. shipping point. Of course, buyer's contention is that it does not pass until destination.

There are two reasons for a scarcity of cases on the supposed conflict between Rule 1 and Rule 5. First it is most unusual to sell specific goods F. O. B. The sale of specific or ascertained goods is normally a retail sale. The parties are present and nothing remains to be done but remove the property from the store or other place of business. The typical F. O. B. sale is a sale by a wholesaler, by a manufacturer or other dealer who sells by description and agrees to make delivery F. O. B. some point or other. Then, of course, courts seize on the point at which he appropriates particular goods to the particular contract by delivery as the convenient point for the passage of title, in the absence of expressed intention.

Second, so obvious is the fact that Rule 1 controls apparent conflicts between Rule 1 and Rule 5, that cases where the point has even been raised are exceedingly scarce. In other words, lawyers and parties do not normally contest, in the case of specific or ascertained goods, the undoubted rule that title passes at the moment the contract is made. The principle of Rule 1 has controlled the only two cases which deal with the point, but which settle the law upon it, which are *Brown Lumber Co. Inc. v. Commissioner of Internal Revenue*, *supra*, and *Central Railroad Co. v. Berry*; 165 N. Y. Supp. 104, 99 Misc. 560.

With respect to the risk of loss, petitioner is equally in error. Petitioner gratuitously assumes that general risk of loss is on seller "until shipment" herein, and urges this as an indication of his title. Who bears the general risk or loss is not specifically covered by the contract in any way. *It must be deduced from the location of title.* The provision in the contract of sale is:

In case of loss prior to removal or shipment,

"seller's liability shall, at election of seller, be limited to the replacement of the property lost, damaged, or destroyed, or refunding any amount paid by the purchaser therefor." (R. p. 17, par. 6.)

The words used are words of limitation. They do not create any new liability. They limit whatever liability otherwise exists.

This limitation is equally useful to the defendant whether title has passed or whether title has not passed. If title has passed, as we contend, the seller in possession is still liable for destruction of the goods by his fault and the measure of damages would, of course, be the fair market value at the time destroyed.

This is a useful *limitation* of the normal liability ("market value") which defendant would have if he caused the loss, damage or destruction of the coal. It is very clearly *not* an *assumption* of general risk.

Even if there were a provision for the assumption of general risk by seller, as counsel for petitioner claims, that would point to prior passage of title. The presence of an express assumption of risk by seller is superfluous where seller has retained title, because of the elementary rule that risk follows title in the absence of express provision. Therefore the express assumption of general risk by seller could only tend to show that title had passed to buyer as otherwise there would be absolutely no need expressly to assume the risk that seller bore by operation of law.

Counsel misreads the axiom that general risk of loss follows title and is proceeding upon the fallacious theory that therefore title follows risk of loss.

With respect to the claimed insistence on cash payment in advance of shipment, there is simply no support whatever in the contract for this position. Whatever affect such a term might have as to title is immaterial. The contract term "cash on presentation of railroad weight tickets as shipped" absolutely precluded payment before shipment, and amounts to substantial credit (well justified by experience under the 1946 contract). Railway weights could not possibly have been presented at Dallas for many days after the contract, and some considerable time after loading and shipment.<sup>4</sup>

<sup>4</sup>Under the earlier contracts, weight tickets, and therefore payment, were often delayed for weeks by railroad procedure before arriving at Dallas.

## A. II. Ownership in Respondent, Legal or Equitable, Requires the Prevention of Conversion.

Irrespective of the foregoing argument, which concerns only the exact time of passage of *legal* title, petitioner has indirectly conceded respondent's equitable title. He argues (at pp. 87 through 93 of his brief) that the contract was a "contract to sell" rather than a "contract of sale" (as it was plainly labeled). Also (at p. 35 of his brief, line 19) in speaking of Respondent's interest which he erroneously claims could only support equitable specific performance, he says "since it (respondent) *already* has title" (Bracketed word and emphasis supplied).

Thus the complete ownership of the coal is in respondent, regardless of exact location of legal title. From the standpoint of property interest, a binding "contract to sell" which bases legal title *in futuro*, instantly passes equitable title to unique property. Thus, in arguing that the sales memorandum was a contract to sell, petitioner logically must concede that respondent has equitable title to its coal. Even if respondent had brought mandamus and asked specific performance, it is well settled that specific performance will lie against officers of the United States (by mandamus) to force legal title out of the sovereign United States for a certain type of unique property, namely, public land and also that its officers will be enjoined from the illegal cancellation of a valid United States disposal contract for unique property. Thus, a citizen who has accepted an offer of the United States by performance (or as tender thereof) under a Public Land disposal patent, or grant, statute, can have performance of that offer where it has ripened into contract by virtue of the citizen's acceptance. *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228; *Payne v. New Mexico*, 255 U. S. 367; *Santa Fe Pac. R. R. Co. v. Fall*, 259 U. S. 197; *Lane v. Hoglund*, *supra*; *Weyerhaeuser v. Hoyt*, 219 U. S. 380; *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.*, 145 U. S. 428; *Hughes v. Moore*, 7 Cranch, 176; *Ballinger v. United States, ex rel.*



*Frost*, 216 U. S. 240; *United States ex rel. McBride v. Schurz*, 102 U. S. 378; *Payne v. United States ex rel. Newton*, 225 U. S. 438; *Montana Catholic Missions v. Missoula County*, 200 U. S. 118; *Stark v. Starr*, 6 Wall. 402; *Barney v. Dolph*, 97 U. S. 652; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496.

This Court in *Payne v. Central Pac. Ry. Co.*, *supra*, unanimously disposed of a contention of sovereign immunity upon the sole ground of finding equitable title in the citizen, as follows:

"We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. *Ballinger v. Frost*, 216 U. S. 240; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-620; *Lane v. Watts*, 234 U. S. 525, 540." (255 U. S. at 233)

"Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step of one who by full compliance has earned the right to receive the title." (255 U. S. at 234)

The court then referred to a similar grant and quoted from *Burke v. So. Pacific R. R. Co.*, 234 U. S. 669 at 679-680:

"... The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described." (255 U. S. 235)

The point was further elucidated in *Payne v. New Mexico, supra*, where the court, after referring to the state's alternative selection of indemnity lands, held this to be acceptance of the sovereign's offer of contract by the following which passed equitable title to the state:

"Acceptance of such a proposal and compliance with its terms confers a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the State proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

"In the brief for the officers it is frankly and rightly conceded to be well settled that 'a claimant to public land who has done all that is required under the law to perfect his claim, acquires rights against the Government and that his right to a legal title is to be determined as of that time'; and also that this rule 'is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him.' See *Lytle v. Arkansas*, 9 How. 314, 333; *Stark v. Starrs*, 6 Wall 402, 417-418; *Ard v. Brandon*, 156 U. S. 537, 543; *Payne v. Central Pacific Ry. Co., ante*, 228."

This Court after again referring to the contract and property status of a purchaser from the sovereign quoted with approval from the opinion of the Secretary of the Interior in the case of *Gideon F. McDonald*, 30 L. D. 124, as follows:

"Mr. McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could

divest him of the right thereby acquired." (255 U. S. 372)

Thus it is shown that the instant case is not only well within the property, contract, and tort rules founded upon the *Lee-Land* line of authorities, but it is, in addition, well within the much narrower doctrine of sovereign property disposal enunciated by the above line of cases controlling the pursuit of a citizen's unique property acquired directly and immediately from the sovereign.

Moreover, the superiority of the general rule of property and trust over an erroneous claim of title by officers of the United States goes beyond these cases. This Court has uniformly compelled specific performance of disposal contracts of the United States not only by enjoining its officers from cancelling its valid disposal contracts, as in the above cases, but also by repeatedly allowing a purchaser from the sovereign United States to pursue his unique property even into the hands of a subsequent purchaser from the United States. In all of these cases, it is, of course, necessary to call into question and examine the supposed title of the United States upon which the second purchaser must rely. Also, it must always be conceded, not only that the United States had both full legal and equitable title at one time, but that the United States had record title at the time of the conveyance to the second purchaser. A leading case of this line<sup>5</sup> is *Cornelius v. Kessel*, 128 U. S. 457, 32 L. ed. 482, in which this Court by a unanimous bench stated the rule in unmistakable terms.

The first purchaser (who was out of possession, it is to be noted) brought ejectment against the second purchaser for the land to which he was equitably entitled. The court

<sup>5</sup> *Hawley v. Dillar*, 178 U. S. 476; *El Paso Brick Co. v. McKnight*, 233 U. S. 250; *Cunningham v. Ashley*, 14 How. 377; *Hughes v. United States*, 4 Wall. 232; *Rector v. Gibson*, 111 U. S. 276; *Bernier v. Bernier*, 147 U. S. 242; *Hedrick v. Atchison, T. & S. F. R. Co.*, 167 C. S. 673.

first dealt with the contract rights acquired under the entry which the first purchaser had made at one time against the United States. This the Secretary of the Interior or Land Commissioner had purported to cancel in order to give the property to a second purchaser (just as the War Assets Administrator here purports to cancel the instant contract for the benefit of a second purchaser). At p. 460, *id.*, the Court said:

"When the tract which was subject to entry was thus purchased and paid for, it *ceased* to be subject to the *disposal* of the United States; it was *not* in equity *their property*. The *legal* title, it is true was retained by them, but they held it as trustee, *for the benefit of the purchaser*, and they were *bound* upon proper application to issue to him a patent therefor." (Emphasis supplied)

By the latter language it is clear that the court would have either compelled specific performance against the sovereign upon its relation or enjoined an illegal cancellation by its officers as readily as it enforced specific performance against the third party conveyee of the sovereign.

There was also present a second factor in that case which is exactly similar to that which petitioner seeks to inject into the instant case, namely,—an officer's authority to cancel a contract of the United States. The court went on to dispose of the claimed right of discretion of the Secretary of the Interior or Land Commissioner to cancel the entry (which was a part of the consideration moving to the United States) by the following:

"It [the proper and lawful exercise of authority and discretion] cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a *right* to a patent therefor; and can no more be deprived of it by order of the Land Commissioner than he can be deprived by such order of *any other* lawfully acquired property." (*Id.* at 461, bracketed material and emphasis supplied)



Exactly the same reasoning, although in different language, was perceived to apply to the instant case by the Court of Appeals below when it disposed of petitioner's claimed discretionary authority to exceed his authority by concluding (at p. 74, Sp. App.) that the discretion which petitioner had before acceptance had already been exercised and exhausted when he executed the final disposal contract to respondent.

Petitioner has not even attempted to show that the same rule which applies to Real Estate (which is always unique) does not apply to unique chattels. Indeed, courts of equity have, since their foundation, been applying the same fundamental rule to all unique property whether it be real or personal. It is hornbook law that the equitable owner of unique property has an absolute right to resort to the jurisdiction of equity to compel both relinquishment of wrongful possession and conveyance of the legal title to his property. The Sales Act even carries the principle a step further by allowing specific performance even where the chattel sold is *not* unique as shown by Section 68 of the Sales Statute (District of Columbia Code):

"§.28-1506 [11:128]. Action for specific performance.

"Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just. (March 17, 1937, 50 Stat. 45, ch. 43, § 68.)"

## **B. Reply Argument to Body of Petitioner's Argument.**

### **I. This is not a suit against the United States.**

Under I, at page 24 of his brief, petitioner prefaces his remarks with comment indicating that he neither understands the application of the law of sovereign immunity,

nor that it has for years been confined to its proper sphere of shielding only the executive discretionary and authorized acts of public officers. He does not seem to recognize that the doctrine of sovereign immunity under our form of government is but a small part of the great body of the law, and that its operation is properly confined to the protection of the lawful acts of Government officials in their executive and discretionary functions. In a free society the doctrine cannot impinge other fundamental rights of property and person.

Petitioner's comment that "in the present climate of opinion" a plea by the Government to turn the Respondent out of court for bringing what he terms "an unconsented suit against the United States" may initially seem "distasteful" can only be taken as an indication of his failure to recognize the whole line of cases judicially delimiting sovereign immunity from *United States v. Lee* to *Land v. Dollar*. His avowed purpose in this case "we have interposed and steadfastly maintained that defense (sovereign immunity) because we believe it to be warranted",<sup>6</sup> etc., is indicative of a desire to continue the use of motions to dismiss in defending cases of the instant type despite the long-standing authorities. In justification of this he can offer only a generalization that the doctrine should be sustained "in this instance by the demands of the public interest and confirmed by the general congressional legislation partially lifting the immunity bar." (Italics supplied.)

I A. *The suit is not one for specific performance of a contract of the United States, but one to prevent interference with respondent's property, title to which happened to be derived from a contract of sale earlier made by the United States.*

The Complaint shows that it does not seek specific performance and does not even seek affirmative relief.

Under I A (1); Page 25, Petitioner claims that the "face of the complaint shows that in all but the defendant's name,

<sup>6</sup> At p. 24, Pet. Brief.

the suit is one to compel specific performance by the United States." There are two difficulties with this assertion, the first of which is that this complaint does not seek to compel the United States to take any action at all much less any affirmative action; the second difficulty is that this complaint does ~~not~~ seek to compel the Petitioner to take any affirmative action of any kind, nature, or description, but only to desist from unlawful interference with the property of a citizen, and refrain from committing conversion. (R. pp. 8, 9.)

In the second sentence of I A (1) at page 25, Petitioner plainly concedes that the United States has no interest in the coal in question by admitting that the coal was *sold* by the United States. He says "the coal *was* admittedly the property, and in the possession, of the United States, which has *duly entered* into a conventional *contract* for its *disposal*." If it *duly entered* into a disposition contract (as it unquestionably did) and as Petitioner says, it must have disposed of the coal, and how could it thereafter assert any property interest in the coal. "Disposed" means "sold," "parted title with." Petitioner later denies that the coal was disposed of at all; that the contract of sale or disposal was of any legal significance and that the solemn covenant of the sovereign meant anything at all in passing title to respondent (either legal or equitable). Nonetheless, this significant admission is most revealing of the true legal nature of the situation.

On Page 26, under the same point (I A 1) in urging the proposition that Respondent breached a contractual obligation, he asserts that there was a contractual obligation on its part "to make a single cash deposit in a Dallas Bank." There was no such obligation in the contract, a point which will be taken up at Page 68, *infra*, under the subject of Breach (Sec. III). Following this, at page 26 petitioner attempts to infer that the fact that the suit was brought against his person as head of a Government agency somehow makes the United States a party to the

case.<sup>7</sup> In describing the capacity in which the defendant functioned, and admittedly now purports to function, it was necessary on the principles of the law of agency, to use words *descriptioni personae* to describe his dual offices held by the person of the Defendant in order that he could not claim the authority of the other office in the event that his capacity was described in terms of only one office. By the same principle it was also necessary to prevent the situation where, in the event of no description of his offices, he could claim that the official capacity of his person would be unaffected by any decree which did not describe the capacity in which he purported to function.

On Page 26, Petitioner then objects that it was not charged that "either he or his subordinates were acting beyond the scope of their statutory or constitutional authority." As this is a conclusion of law, it would not be well pleaded and as a matter of fact (Complaint, paragraphs 5 12 and 14; R. pages 2, 6, 7) was sufficiently pleaded by the factual allegations upon which to base this legal conclusion.

Thereafter, at page 27, Petitioner charges that Respondent's "whole effort is plainly to compel the War Assets Administrator, as an official of the United States, to fulfill the United States' contract by officially ordering his subordinates to load the ten thousand tons of coal upon receipt of Respondent's shipping orders." As shown by the footnoted quotation of the Complainant's prayer, (footnote 16, Page 27) Petitioner relies for this extravagant claim on something which shows plainly that the only thing that could be realized by the decree was that "Plaintiff have thirty days from the date of the court's final order in which to give shipping instructions". (Italics

<sup>7</sup> It is significant that in footnote 14 at the same page, Petitioner confines his argument to a claim that the War Assets Administration not the person of the Administrator is "an administrative unit of the United States". He seems to base his entire argument that words *descriptioni personae* cannot be used in describing the capacity of the person of the administrator on the theory that Congress has not made the "Administration suable". He also overlooks that cases against the Secretary of the Interior have been captioned in the same way.



supplied.) It plainly did not attempt to enjoin the *acceptance* of such shipping instructions but only sought to allow thirty days in which they could be *given* under the contract without breach.

The essence of petitioner's contention in this section of his brief is as follows: the interference with respondent's property is a breach of respondent's contract with the United States and therefore, a decree against the interference is in effect a decree of specific performance.

The error of this is patent; although incidentally a breach of contract, the interference is more serious than that; since respondent, as we have shown, has title, the attempted sale of respondent's property by petitioner is a tort by him as an individual; it amounts to an arbitrary condemnation of the citizens property by a wrong doing officer.

Thus, while only the parties to a contract may be sued for its enforcement, a wrongdoer interfering with property, title to which happened to be obtained by contract, cannot say, even though he be agent for one of the contracting parties, that his principal is a necessary party. For he is committing a wrong independent.

In *re Ayres*, 123 U. S. 443, and *Shubert v. Woodward*, 167 Fed. 47, cited by petitioner, stand for this general rule rather than the equation which he claims for it: where the prayer of the bill expressly requests injunction against "*all breaches*" of a contract, it is in effect a bill for specific performance. But In *re Ayres*, as usual in this Court's treatment of sovereign immunity and its limitations, it is careful to distinguish cases where the act threatened, although perhaps a breach of a contract of the United States, is also an unlawful attack, by the

<sup>8</sup> Petitioner's unfounded misapprehension that respondent's prayer calls for any type of *acceptance* much less acceptance from the *United States* is well demonstrated by his footnote #15 at the same page where he quotes from a case which admittedly was a suit "to oblige the United States to *accept* continued performance". (Emphasis supplied.)

officer on "other rights of person and of property". 103 U. S. at 503.

Thus on petitioner's theory, *Land v. Dollar* is incorrectly decided; since the wrongful withholding of Dollar's stock was also a breach of the contract of pledge.

In *Shubert v. Woodward*, *supra*, the Court pointed out that, even where specific performance could not be granted, an injunction against invasion of an independent property right—e.g. a patent—could be issued, even though that right happen also to be guaranteed by the unenforceable contract.

"This, like most general rules, is not without its exceptions, under which injunctions may be lawfully issued to restrain the performance of specific acts in violation of agreements whose specific performance the courts would not completely enforce, as where certain acts violative of an agreement constituted an infringement of complainant's patents" (167 Fed. at 53, 54).

I (A) (2) Beginning at Page 28, Petitioner asserts that this suit is one for specific performance. Nowhere does the Petitioner support the assertion with any argument as to how, why, where and when the prayer of the Complaint seeks specific performance, or even any affirmative relief against the person of the defendant, much less against the *United States*.

Under I A 3, page 29, petitioner's argument is premised upon this same error, inasmuch as he claims to apply the law of a case where affirmative relief was requested against officials of the sovereign; where performance would affect the sovereign's treasury. The sovereign's treasury could in no way be affected in the present suit unless petitioner were allowed to subject it to double liability by being allowed to convert respondent's coal. Needless to say, again there is no affirmative relief prayed for in the present complaint; and the treasury could not be adversely affected by respondent obtaining its coal rather than the ascertainable portion of its damages for the conversion thereof.

The relief requested in the instant case is fully prohibitive or negative. It does not seek to compel any positive or affirmative action upon the person of the petitioner, much less the United States. At page 30, petitioner as if seeking to reinforce his erroneous argument of "specific performance" by constant repetition, again reiterates his unsupportable claim that this is the relief sought, and that although non-existent, its effect somehow is cast upon the United States because "a declaration was asked that Respondent had good title to its property and that the means by which it acquired title is still valid and in effect." This is answered at p. 33 *et seq. supra*.

Under sub-section 4 of I A, at page 31, petitioner assumes that "Mr. Larson will be required, if Respondent will be ultimately successful, to order his subordinates not to deliver the coal to the Midland Coal Company *but to load it on freight cars at Camp Maxey, Texas, in accordance with respondent's shipping instructions*".

As pointed out, *supra*, the trouble with this argument is that the complaint does not seek this affirmative relief and does not undertake to compel the action which petitioner erroneously claims is the relief sought.

Even if delivery of the coal were sought, it is well established that mandamus would lie for a merely ministerial act, such as loading coal (or handling of stock certificates such as were involved in *Land v. Dollar*, or discontinuing wrongful possession as in *United States v. Lee*.) That illegal dealing with the property of citizens by Government officials may be prohibited by negative injunction is too well established by the *Lee-Land* line of authorities to require detailed argument herein. Even positive relief was approved in the *Land* case.

At sub-section 5 of I A, page 33, Petitioner undertakes to state respondent's answering argument for it on the subject of "specific performance". Inasmuch as respondent does not and has not prayed "specific performance" nor even delivery, but only protection of its title, petitioner's lengthy discussion from Page 33 to page 38 on this subject is rendered meaningless, except for its revela-

tion of the false premise upon which petitioner's entire defense is based.

Petitioner represents that this Court decided the case of *Goldberg v. Daniels* (231 U. S. 218) "without determining the issue of title".<sup>9</sup>

This is at complete variance with the *only* holding of the case. This court's unanimous opinion stated:

"We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the *owner*, in possession of the vessel." (*Id.* at 221. Emphasis supplied.)

Thus the only ground of decision was title in the United States and while it is difficult to realize that petitioner does not recognize that *ownership* and *title* are synonymous, such seems to be the case.

The underlying errors footnoted at this same page are also worthy of note. Petitioner states that "In view of the detailed pleadings of facts and circumstances the Secretary's allegation of title was a conclusion of law which the plaintiff's demurrer did not admit". (The Secretary of the Navy *answered*, alleging title in the United States.)

For this proposition he cites the *Newport News* and *Nortz* cases distinguished *supra* p. 24; but, as we have there shown, an allegation of title is a well pleaded allegation of ultimate fact, *not* a conclusion of law. Therefore Goldberg's demurrer to the answer did concede title in the United States. This was the only basis for the statement of Justice Holmes: "The United States is the *owner* . . ."

At the very least, this demurrer deprived Goldberg of the benefit of the rule that all doubts shall be resolved in favor of the complaint on motion to dismiss, and gave the benefit of that rule to the Secretary of the Navy's answer.

<sup>9</sup> Pet. Brief, p. 36.



A quotation from the recent correct application of the Goldberg case in *Fulton Iron Works v. Larson*,<sup>10</sup> No. 9799, App. D. C., decided Oct. 13, 1948, is in accord.

The case which to us seems absolutely controlling on this point is the celebrated case of *United States ex rel. Goldberg v. Daniels*.

That was a case in which there had been survey, condemnation and appraisal of the old U. S. Cruiser Bosfon and the cruiser was stricken from the Naval Register by authority of law. Thereafter the Navy advertised for proposals of purchase. Goldberg bid more than the appraised amount sending a certified check for the whole sum bid. On the opening of the bids, Goldberg's bid was highest. Secretary Daniels, having in the meantime decided to accede to the request of the State of Oregon to loan the old cruiser to that State as a training vessel, refused to deliver the vessel and returned the check to Goldberg. Goldberg petitioned for mandamus to compel the Secretary of the Navy to deliver the vessel to him. Daniels in his answer admitted all the facts as stated but set up that the bid is not an acceptance of an offer but is itself only an offer, subject to be accepted or not at the discretion of the Secretary of the Navy, who never accepted Goldberg's bid, the Government meantime having decided to lend the cruiser to the State of Oregon. Goldberg demurred but this court dismissed the petition on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids even though they satisfied all the conditions prescribed. 37 App. D. C. 282 *sub. nom. United States v. Meyer*.

On appeal to the Supreme Court, Mr. Justice Holmes speaking for the Court in one of those succinct opinions for which he is so justly famous said: "We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made

<sup>10</sup> This was the same bench which unanimously decided the instant case below.

a party, this suit must fail [citing cases].'' (Emphasis supplied.)

Thus, both the complaint *and answer* are entitled to equal weight. Taken together, they unmistakably showed a mere offer to buy the Boston, and therefore no title in Goldberg, but rather in the United States.

Justice Holmes, therefore, correctly ruled that the United States is the *owner* and that there is no need to bother about discretion, as no contract of sale existed; only the offer to make one.

Here, the situation is radically different. The complaint, *standing undenied*, alleges title<sup>11</sup> in the citizen, and must be taken as true. Moreover, a contract of sale, not a mere offer, is shown by the Exhibits. Petitioner's objection that the complaint sets out much of the basis of the allegation applied with equal force to the *Lee-Land* authorities.

#### I (B). *The Lee-Land Authorities Control Herein.*

Under I B, Petitioner has adopted the device of setting up five noval qualifications of the Lee-Land line of authorities, which he then proceeds to demolish as applied to the instant case. The line includes:

*Cunningham v. Macon & R. R. Co.*, 109 U. S. 446, 452, 27 L. ed. 992, 994, 3 S. Ct. 292, 609; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 S. Ct. 770; *Smith v. Reeves*, 178 U. S. 436, 439, 44 L. ed. 1140, 1142, 5 S. Ct. 919; *Scranton v. Wheeler*, 179 U. S. 141, 152, 153, 45 L. ed. 126, 133, 134, 21 S. Ct. 48; *Philadelphia Co. v. Stimson*, 223 U. S. 619, 620, 56 L. ed. 576, 577, 32 S. Ct. 340; *Goltra v. Weeks*, 271 U. S. 536, 545, 70 L. ed. 1074, 1079, 46 S. Ct. 613; *Ickes v. Fox*, 300 U. S. 82, 96, 81 L. ed. 525, 530, 57 S. Ct. 412; *Great Northern L. Ins. Co. v. Read*, 322 U. S. 47, 50, 51, 88 L. ed. 1121, 1123, 1124, 64 S. Ct. 873.

<sup>11</sup> Title is a well-pleaded answering allegation to show rejection of an offer.

Not only is the instant case within the broad doctrine of property, tort, and contract, enunciated by the *Lee-Land* line but it is also within the much narrower rule of the sovereign disposal authorities treated at p. 33, *supra*; which fully elucidate the property and trust aspects of governmental sales and disposals.

Under I B 1, page 30, he cites the *Land* case as prohibiting specific performance and quotes therefrom the distinguishing language of an "attempt to get specific performance of a contract to deliver property of the United States (330 U. S. 737). As pointed out *supra*, the difficulty with this argument here is, of course, that the United States does not own the property involved; and specific performance is not requested.

Under I B 2, his second proposition is that Respondent has not made a substantial claim that Petitioner is seeking to act in excess of his statutory authority. As pointed out, *supra*, this is a conclusion of law which could not be well pleaded, and the complaint in paragraphs 5, 12 and 14 (R. pp 2, 6, 7) alleges facts requiring this legal conclusion.

At page 43, petitioner reveals the rationale of his entire philosophy of the law with respect to this case. After a recital of the statutory law authorizing the petitioner to dispose of public property, he acknowledges that his concept of his authority is that it is so *broad* in scope and all-inclusive in nature that he has a legal right to *misconstruct* contracts on behalf of the United States for which only it is liable. He says, on page 43, in referring to his authority "This plenary grant of power indicates that the Administrator's official authority with respect to disposal contracts was not limited to a correct interpretation of the contractual terms; even when he *erroneously constructs* a particular agreement and order his subordinates to withhold surplus property in accordance with *that interpretation*, he acts within the scope of his *lawful* authority as War Assets Administrator". And further, "the refusal

to deliver the coal was thus an *authorized act* although it may have resulted in a breach by the United States . . . .” Thus petitioner pegs his entire concept of his authority on the theory that he is privileged to misconstrue the law of property and sales and recapture title at his whim—i.e., to condemn any property he has once transferred. Whether he has a “right” to misconstrue ordinary contracts is not here in issue; the point is that a right to misconstrue a contract of sale or any other document passing title is a right to confiscate the property of the citizen. This Congress could no more have intended than that its laws for disposal of public land by patent could be reversed by its officers after performance or tender by the patentee. Cf. *Lane v. Hoglund*, *supra*, and related cases at p. 33 *et seq.*

Petitioner thus urges that the unlawful act of misconstruction is made lawful; or viewed from the standpoint of authority, that the Administrator has authority to exceed his authority.

On the same point the petitioner argues that he has exactly the same authority as the president of a mail order house who is “authorized” to misinterpret a contract by his principal. This is an exercise in fallacious semantics: because the mail order house cannot lawfully *authorize* a tort or breach of contract. Petitioner’s phrase comes from its *vicarious* liability; to hold the corporation so liable, courts say that the particular unlawful act of the agent of the corporation, although *unauthorized*, was within the *scope* of his general authority. So in *Land v. Dollar*, the loan to Dollar was within the scope of Maritime Commission general authority; but that did not cloak with authority, or immunity, the Commissioner’s wrongful act in illegally withholding stock owned by the citizen Dollar; even though that, too, was within the general scope of their authority in some fact situations; but unauthorized in the individual instance because illegal.

Another difficulty with petitioner’s point is that the United States of course has not authorized the tort of con-



version. Although petitioner is silent on that aspect, it may fairly be deduced that he also urges authority for the tort of conversion by the same verbal fallacy. The contrary rule not only applies to liability where the tort has already been committed, but, even more clearly, to the prohibition of the commission of a threatened future tort. Petitioner then indirectly attempts to make a third point by implying that both the United States and the mail order house would be exclusively liable for any such wrongful act; that the officers or agents, therefore act with personal impunity for their part in the wrong. This, of course, overlooks that the wrong-doing actor can never escape the legal responsibility for either tort or crime merely because a principal is also vicariously liable.

It is most difficult to see how petitioner hopes to draw comfort from the case of *Wells v. Roper* which he argues and quotes<sup>12</sup> on his erroneous proposition "that a government official misconstruing a government contract does not thereby normally exceed his powers".

This case involved an attempt to force the United States to continue accepting the performance of services under its contract. As petitioner concedes the Court pointed out that "the effect of the injunction asked for would have been to oblige the United States to accept continued performance" (246 U. S. at 337). Thus this court applied for the benefit of the United States the equivalent of the general hornbook rule of contract and agency, that no master or principal is obliged to accept the services of an agent or employee. This is because damage for breach is an adequate remedy; and because the policy of forcing acceptance of services, and therefore, possible vicarious liability, upon an unwilling party is abhorrent.

That the sole ground for its decision was the character of the authority validly exercised by the government officer, is made crystal clear by this court's express holding "that the duty of the Postmaster General, and of the defendant

<sup>12</sup> At. pp. 44-45 Pet. Brief.

as his deputy, was executive in character, not ministerial, and required an exercise of official discretion" (*Id.* 338).

The question of breach *vel non* (or "misconstruction of the contract" as petitioner prefers to call it) had utterly nothing to do with the above sole point of decision, as the italicized portion of petitioner's quotation from the case (p. 45, Pet. Br.) plainly shows: "And *neither* the question of official authority *nor* that of official discretion *is affected* for present purposes; by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach" (246 U. S. at 338).

Thus the "misconstruction" had no relation whatever to the *only* point of decision which depended entirely upon the executive character of the officer's act, and the case could not possibly stand for petitioner's proposition that normally unlawful misconstruction is a part of lawful executive discretion.

Carrying the mail can be done only as agent for the sovereign; and the sovereign, *like any other principal*, has lawful discretion to dismiss agents, being liable only in damages for breach of a contract to retain the agent. Thus Roper as an officer of any ordinary corporation would have the same immunity from injunction. This is a far cry from a supposed discretion arbitrarily and illegally to condemn property of a citizen by "misconstruing" petitioner's contract which gave the citizen title. If so, why were not the officers involved in the *Lee* case entitled to "misconstrue" themselves into title, by misreading their tax deed?

Petitioner, in addition to claiming the necessity of allegations of force and violence<sup>13</sup> in the complaint undertakes reiteration of his previous argument that a conclusion of law must be alleged as fact in a complaint. This time he argues that the affirmative conclusion of law as to whether or not certain acts amount to a tort must be contained in

<sup>13</sup> At p. 46, Petitioner's Brief.

a complaint. Obviously the complaint alleges facts amounting to a tort. The legal conclusion that the tort of conversion is about to be committed is supported by these allegations of fact. The complaint fully specifies the request for relief from *further* wrongful acts by petitioner.

Petitioner then denies<sup>14</sup> that there has been personal misconduct on the part of either the petitioner or his predecessor in office. That there was, is a fact which can be fully shown and established at trial. It has been alleged that they were acting illegally in purporting to sell respondent's property (as revealed in the quotation in Petitioner's Brief, page 47, footnote 30). Their threatened action could only amount to the commission of the tort of conversion. Their personal knowledge of the affair is of course a part of their illegal actions with respect to respondent's coal. This not only can be fully established at trial but personal participation is already plainly shown: first, by an affidavit supporting his subordinate's actions which petitioner Larson made in the Court of Appeals when the cause was pending there against Littlejohn, and second, by petitioner Larson's substitution of himself in this cause on his own voluntary motion in this Court. By his substitution he affirmed Littlejohn's previous and threatened wrong (in which as a matter of fact he had participated).

Having asserted a supposed personal innocence on the part of the petitioner and his predecessor, petitioner then urges the innocence of his subordinates upon the ground they were acting on his orders. But he cannot have it both ways. If a wrong is being done, either he approves it or his subordinates, who act officially only in his name, are acting as private individuals, in continuing it contrary to his wishes.

Actually both horns of this dilemma are of academic interest only, since the wrong of withholding the respondent's property is a continuing one and the proposed con-

<sup>14</sup> Petitioner's Brief, p. 47.

version has not yet occurred. Petitioner can stop one and prevent the other. The cases which he cites<sup>15</sup> are applicable solely to non-liability of public officers in damages for torts already completed by their subordinates without approval.

It is urged that failure to deliver where one has no power to deliver may be a breach of contract but not conversion. But petitioner or his subordinates can voluntarily order delivery at any time, though this is not sought in the prayer of this complaint.

Petitioner undertakes to absolve himself from the wrong of his predecessor.<sup>16</sup> As Petitioner must well know, he had a number of conferences with officers and counsel of respondent long prior to the institution of suit. Petitioner's close personal knowledge of this transaction can be fully established at trial.

The present petitioner, Larson, makes the assertion at page 49 of his brief that he "does not stand in the shoes" of his predecessor. This is an astonishing contention. He has plainly, by his own voluntary motion, substituted himself in this Court as a party to this litigation for his predecessor, the former petitioner Littlejohn, so that actually not only does he stand in the "same shoes" as Littlejohn, but he has voluntarily of his own motion climbed into those very "same shoes" thereby renewing and affirming his predecessor's continuing wrongful act and his own previous participation in it.

At pages 50 and 51 of Petitioner's Brief it again becomes necessary to point out that the relief sought request no affirmative action and that even mandamus to hand over the coal would require a ministerial act just like handing over stock certificates in the *Land* case.

At page 51, petitioner asserts that "here the complainant demands something more than withdrawal from his property and seeks to compel continuing affirmative action by a

<sup>15</sup> Footnote 31, Petitioner's Brief.

<sup>16</sup> Page 49, Petitioner's Brief.



government agency." Again it must be pointed out that the complaint seeks no affirmative relief of any kind, nature or description and the petitioner is required to do nothing except refrain from committing the illegal acts which he threatens. Respondent itself can load the coal if necessary or once it is determined that petitioner cannot convert respondent's property, petitioner might voluntarily load it.

Petitioner seeks to create one rule for a citizen's long-held property and another for newly acquired property.<sup>17</sup> He urges that respondent in the instant case must have owned his property for a very long time; that respondent's property must never have been owned by the government at any time. (By inference he later argues that *legal* title derived from a contract of sale is necessary and denies the sufficiency of equitable title derived from a contract to sell unique property). Under this theory the United States could wrongfully withhold possession or illegally claim by seizure on any property once owned by the United States. Thus, any purchaser of any part of the one-fourth of the land of this country, once owned by the United States, or of the billions of dollars of surplus personal property which has been sold, could never have a good title. Petitioner would to this extent unsettle vested property rights that have stood for hundreds of years and are valued into hundreds of billions of dollars. The sovereign disposal cases (pp. 33-35 *supra*) completely demolish petitioner's argument on this.

Petitioner concedes<sup>18</sup> that a citizen's property "improperly held from the claimant by a government officer" may require "an opportunity to recover" it. This concession is most valuable in connection with an admission which he makes at the top of the next page (55) where, in the course of denying that such rule applies to the instant case, he admits that the coal in question was *sold* to respondent. He says that such opportunity of relief should be denied to cases of "government surplus property sold by the gov-

<sup>17</sup> See 4, B-1, page 51, Petitioner's brief.

<sup>18</sup> Page 54, Pet. Brief.

ernment but undelivered for reasons *deemed adequate* by the surplus property officer." This reveals the sweeping nature of petitioner's claimed privilege to ignore the law of property. In essence, it is that, even though the government has validly sold and finally disposed of property to a citizen, petitioner yet retains, by reason of mere possession, the sovereign right to deny an opportunity to the citizen to obtain his property for any reason, however arbitrary, provided only petitioner "*deems it adequate*".

Petitioner then devotes argument to the proposition that the rights of the sovereign United States are somehow affected by the relief prayed in the instant case.<sup>19</sup> This overlooks the significant admission of fact and underscores the deficiency of petitioner's legal proposition. He concedes that the *Lee-Land* line of authorities were controlled by the fact that they affected possession only and that the property interests of the United States could in no way be bound or affected by the judgments therein. Just as in the *Land* case, so here, proof that the citizen has title to the property, possessed by government officials, is sufficient to show absence of effect on the United States. In the instant case the United States has neither answered nor appeared to assert title, nor has the petitioner personally answered to alleged title in the United States. Respondent's prayer only asked an injunction against the petitioner to prevent him personally from attempting to sell its property.

Petitioner cites the law of and argues the facts<sup>20</sup> of *Mine Safety Appliances Company v. Forrestal*, 326 U. S. 371, and quotes from pages 374-375 thereof. The quoted portions of this case<sup>21</sup> plainly show that it was an attempt on the part of the citizen to force the U. S. to "relinquish ownership" of the money in question. The decree must necessarily take money out of the Treasury in payment of a supposed debt. The citizen could not possibly have title to any particular part of the Treasury balance.

<sup>19</sup> Page 55, Sec. 5, Pet. Brief.

<sup>20</sup> Footnote 39, page 56, Pet. Brief.

<sup>21</sup> Page 57, line 5, Pet. Brief.

Petitioner attempts a summary of his fallacious and unpremiered points<sup>22</sup> under the five preceding subsections of I B. In summary *in seriatim*, the following answer is made:

1. The complaint neither prayed (a) specific performance of respondent's contract nor (b) did it mandamus the purely ministerial act of shoveling coal, nor (c) did it request positive action of any kind, nature or description on the part of either petitioner or his subordinates. An action in equity cannot possibly be one for specific performance unless prayed in the complaint.

2. The complaint makes "a short and plain statement of facts" from which the legal conclusion that petitioner purported to exceed his authority and was about to commit an excess thereof must be drawn.

3. (a) The complaint alleged facts from which the legal conclusion that a tort was about to be committed must of necessity be drawn.

(b) The relief requires no affirmative act of defendant either in his official or unofficial capacity.

4. (a) Title not only means substantial but also real and complete ownership either equitable or legal which knows no dilution of quality.

(b) Length of ownership or prior ownership do not affect the rights of a citizen owner. Large portions of both the law of property and of torts and of crimes are entirely dependent upon the meaning and incidence of property ownership. (See pp. 33 to 38 *supra*)

5. In seeking to restrain the unauthorized acts of petitioner with respect to the coal in question, it is necessary for respondent to show that its lawful property rights are being invaded and it is therefore necessary to show that it owns the coal in question (which it does in fact; and in any event on the present status of the pleadings) and that it has lawfully acquired title thereto. Just as in the *Lee*-

<sup>22</sup> Pages 57, 58, Pet. Brief.

*Land* and sovereign disposal lines of authorities, there is here necessary a declaration that the citizen has title which renders the proposed action of petitioner Larson completely illegal and unauthorized under law.

C-1. *The United States has not claimed and cannot lawfully claim title to respondent's property.*

Under C of I, at page 59, petitioner again reiterates his fallacious and unsupported claim that "this suit compels specific performance of a government contract concerning the sale of government-owned coal". It is thus again necessary to point out the prayer for relief seeks no affirmative act of any kind, nature or description from petitioner or his subordinates and much less does it seek specific performance of a sale contract already performed by the United States.

Petitioner then assumes that "the subject of the contract (coal) is property which the United States claims as its own." Thus petitioner makes it necessary to reiterate that the United States neither has property interest in the matter nor has become a party to this suit, *nor has petitioner answered by way of defense alleging title in any third party, including the United States.*

At page 59 under sub-point 1 of C-1, petitioner concedes that cases within the *Lee-Land* rule are "perhaps" excepted from the rule of sovereign immunity. But he would apply immunity to any "suit directly involving the use, possession, or title of property in which the government claims an interest." His rule does not fit the facts for the instant and *Lee-Land* cases, inasmuch as this is not a suit in which the government "claims" title by answer (it is presumed). Possession is necessarily involved in all of the *Lee-Land* line. In any event, his concession of an exception for the *Lee-Land* line of authorities must of necessity include an exception for the instant case to the broad rule which he has erroneously stated in his own terms. In fact, the instant case is much stronger than the *Land* case, as there can be



no question here of respondent's either legal or equitable title to its coal, either within or *aliunde* the pleadings. In the *Land* case record legal title was concededly in the United States and the Dollar interests prevailed solely on a claim of equitable title. Also affirmative action was *required* by government thereunder while no such relief has been sought here.

Petitioner then undertakes<sup>23</sup> to support his proposition by citation and argument of *Louisiana v. Garfield*, 211 U. S. 70. At page 61 of his brief, petitioner erroneously states that "Justice Holmes briefly reviewed the States' arguments that it had good title to the land, stated that at least the case was doubtful, and concluded: 'But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.'"

However, the court did not dispose of the allegation of title on the quotation supplied by petitioner. The Court first determined that Louisiana's record title contained a fatal flaw *upon the pleadings and the relevant land statutes*.

"The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. *Therefore it was void upon its face.*" (*Id* at 77—italics supplied.)

Petitioner's quotation relates solely to another question, namely, the doubtful ability of the United States to deny its void "swamplands" grant after the lapse of a five years statutory limitation period.

Petitioner correctly admits at page 61 that "Mr. Justice Holmes, for the Court, first assumed 'for purposes of decision that if the United States clearly *had no title* to the land in controversy we should *have jurisdiction* to entertain this suit'." (211 U. S. at 75.) (Italics supplied.)

Thus petitioner's quotation related solely to a statute making void patents conclusive upon the United States. It

<sup>23</sup> Pet. Brief, pages 60 and 61.

did not relate in any way to the allegation of title under grant by the plaintiff Louisiana but only to the doubtful question whether possession under a void swamplands grant after five years might have conferred rights *additional* to the claim of title by grant (void as a plain matter of law) which Louisiana stated in its complaint. Upon this *separate* question the United States would have to be heard because the proof would be directed to showing absence of possession *by the United States* during the entire period.

Thus petitioner's proposition that the case lays down a rule broad enough that a citizen's complaint alleging title by grant, patent, or bill of sale is to be dismissed for want of jurisdiction without answer, trial or inquiry is incorrect. See pp. 33-38, *supra*.

The case of *Stanley v. Schwalby*, 162 U.S. 255, is one from which it is difficult to see how petitioner can derive comfort.<sup>24</sup> On the contrary it clearly delineates a sound limitation of the *Lee-Land* line of cases, not applicable in the present situation, but which affords adequate protection to the interests of the United States. In that case, *Schwalby* brought suit in State court in Texas under a State statute permitting an action of trespass to *try title*. The result was binding not only against the parties but upon all persons claiming from, *through*, or under such party. The plaintiff *Schwalby*, by a deed unrecorded for fifteen years, claimed a one-third undivided interest in a military reservation. The officers *filed an answer*, setting up title in the United States as a justification.

This Court ruled, as a matter of law, that title to the whole of the land was in the United States and gave judgment accordingly:

"The inevitable conclusion, as matter of law, is that the United States acquired a good and valid title, its innocent purchasers, for valuable consideration and without notice of a previous conveyance to *McMillan*." (*McMillan* was the source of plaintiff's title.)

<sup>24</sup> See Pet. Brief, p. 61 *et seq.*

It may be noted, moreover, that a proper following of the "answer" procedure used by the United States in *Stanley v. Schwalby* would, wherever the United States has a substantial claim of title to the property claimed by the citizen, afford a perfect method of preventing the "disastrous" consequences suggested by the petitioner. But it is a long way from the sound rule of *Stanley v. Schwalby* to the sweeping view of the doctrine of sovereign immunity taken by petitioner in this case. In this connection, this Court there expressly reaffirmed the doctrine of *United States v. Lee* in the following language:

"The validity of the authority exercised by the defendants as officers of the United States depends, according to the decision in *United States v. Lee*, before cited, upon the question whether the United States had or had not a good title in the land." (*Id.* at 278.)

This quotation disposes of petitioner's contention that an officer of the United States can have authority to exceed his authority by "misconstruing" documents of title.

*ID The decree sought could neither affect the public domain nor interfere in the lawful public administration.*

Petitioner<sup>25</sup> (apparently under the impression that it helps establish his proposition that a decree in this case would somehow expend itself on the public domain) launches into a general attack on this court's authoritative decisions under the sovereign immunity doctrine and characterizes them as a "murky zone". That these authorities clearly delineate the distinctions between illegal dealings by public officers *with the property of citizens*, and the protection of valid executive and discretionary functions is unquestionable, although on other points all the authorities cannot be reconciled. Persistent attempts to cloak officers' wrongful acts by misapplication of the doctrine of immunity has never been sanctioned by this Court.

<sup>25</sup> I D, Page 63, Pet. Brief.

Drawing together alleged "governmental considerations" which petitioner claims have been threading his argument, petitioner offers criticism<sup>26</sup> of jurists and lawyers who recognize the proper application of the rule by claiming that sovereign immunity "does not stand high in their estimation". Such is not the case. Sovereign immunity in its proper sphere is a very necessary doctrine. This is undoubtedly generally recognized by the bench<sup>27</sup> and bar alike. That the doctrine cannot be extended to a point of sanctioning an overturn of the fundamental rules of property and tort which have stood for hundreds and even thousands of years is likewise generally recognized by bench and bar alike, except for that small segment of the latter which has persisted for many years in attempting to extend the doctrine to fields where it has no place. This small segment has succeeded only in erecting a line of authoritative monuments to their intransigence such as the *Lee-Land* line of cases which set forth in unmistakable terms the folly of attempting to cloak unauthorized wrongful and tortious acts of public officers in the majestic mantle of sovereign immunity.

The rest of petitioner's argument under subsection 1 on pages 64, 65 and 66 is devoted to the fact that respondent voluntarily entered into the contract. For that matter, the sovereign United States directly invited Domestic and Foreign to bid—which in no way relates to an expenditure of the decree in this case upon the public domain. Petitioner also comments that at the time respondent purchased its property it was "fully aware of the status of its opposite number". The same reasoning applies to petitioner. He knew the status of his opposite number and the *Lee-Land* rule, all of which is immaterial to the expenditure of this decree upon the public domain.

<sup>26</sup> I D. 1., Page 64, Pet. Brief.

<sup>27</sup> Cf. *Fulton Iron Works v. Larson*, No. 9799 App. D. C., Oct. 13, 1948 (Citizen's offer, rejected even by "skulduggery", gives no standing to enjoin a wrongdoing officer.



Petitioner casually disposes of respondent's ownership<sup>28</sup> under the rules of property and sales and characterizes them as "technical title" and "formal property interest". Title and ownership are not technical, though they may depend on technical rules—they either exist or they do not and if they do they carry with them all the rights and incidents of ownership. It is impossible to see how this type of argument requires the decree in this case to expand itself on the public domain.

From a practical standpoint, it is difficult to see how the United States will be aided, in the disposal of bulky surplus property, if purchasers can have no certainty of title until actual delivery. As pioneer purchasers of surplus coal, respondent knows the great expense and extensive arrangements involved before shipping instructions can be given. Railroad rates must be established, an ultimate buyer found, export licenses obtained, railroad cars ordered in, and a hundred other arrangements completed. Incidentally, it may have been due to fear of conduct such as actually occurred that, when respondent bought the first surplus coal in 1946, the highest bid the United States had received was a few cents a ton.

Petitioner argues<sup>29</sup> the "practical ends" of the immunity doctrine and claims that "coal forming part of the United States' surplus stores and in its custody, would be *abruptly transferred* out of its hands by court order, and government officials would be required to *load and deliver* the coal to respondent's order". Again it must be pointed out that no affirmative relief whatever is requested by respondent in its complaint. This quotation is another example of the fanciful claims which petitioner seeks to engraft on to respondent's prayer for relief in the instant case. The coal is no longer surplus. Title was long ago transferred out of its hands, and no such transfer is sought here.

<sup>28</sup> Page 66, Pet. Brief.

<sup>29</sup> I-D, subsection 2, page 66, Pet. Brief.

Petitioner next complains that an appeal was taken in this case from the District Court's dismissal of the complaint, fifty days before the day petitioner would be required to answer under the Federal Rules of Civil Procedure. He apparently is attempting to criticize respondent for this and the fact that he was deprived of the "relatively lengthy periods (which) are established in order that the necessary reports be made and the government's law officers may familiarize themselves with the facts before answering".<sup>30</sup>

It is entirely petitioner's own fault that he did not answer. It was he who filed the Motion to Dismiss and voluminous affidavits five minutes before hearing. This necessitated the appeal from the District Court's hasty decision.<sup>31</sup> Apparently the gist of petitioner's argument that the decree in the instant case would expend itself upon the public domain consists in the inevitable fact that any property owner, seeking to protect his property from unlawful interference by a governmental officer, will cause such officers some time and effort in the Courts. But, of course, officers are acting neither for the public domain nor in the public interest when they seek to commit illegal acts with respect to a citizen's property.

*I. E. No Mandamus has been sought and even if it had been it would lie for the purely ministerial act of loading coal or withdrawing illegal possession.*

Petitioner seems to claim both that mandamus has been requested in this case and that affirmative action is requested in some form.<sup>32</sup> Such is not the case as pointed out numerous times before; but respondent repeats that even if mandatory relief had been requested to the extent

<sup>30</sup> Pet. Brief, page 69.

<sup>31</sup> "The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled." R. page 58.

<sup>32</sup> I. E. page 70, Pet. Brief.

of requesting the loading of respondent's coal, by its nature this would be purely ministerial. Petitioner, however, concedes that mandamus would be proper even if requested "if respondent were to show that petitioner and his predecessor had no discretion to construe the contract as they did." Petitioner then again reiterates his claim that he has authority to enlarge his own authority to include condemnation by misconstruing the contract and in effect to act as a Court of last resort on the property interests of citizens. Thus petitioner, unless he can establish his absurd proposition that he has authority to exceed his authority (by misconstruing a contract) has conceded that loading the coal would be mandamusable if it had been prayed in the complaint.

Petitioner cites *Brashear v. Mason*, 6 How. 92 and quotes therefrom.<sup>33</sup> His own quotation clearly reveals that the citizen there sought to compel affirmative action from a public officer and at the same time collect a debt from the public treasury.<sup>34</sup> Needless to say the complaint in the instant case seeks no affirmative relief against either the United States or the petitioner personally nor does it attempt to enforce a debt and compel payment of *money* from the public treasury.

## **II. District Court Had Equitable Jurisdiction to Enforce Conversion of Respondent's Coal.**

### **A. Tucker Act gives neither a plain, adequate, remedy for irreparable damage nor protection from future tort.**

Petitioner seeks to contradict the plain allegations of the complaint<sup>35</sup> although he has neither answered nor can he answer under the facts which respondent is prepared to

<sup>33</sup> Page 72, Pet. Brief.

<sup>34</sup> The quoted portion of the opinion establishes that the Court was laying down a rule to deny mandamus where such "would show the title of the relator to his *pay*, the amount, and whether there were any monies in the *treasury*." (Emphasis supplied.)

<sup>35</sup> II A. page 73, Pet. Brief.

prove at trial. He seeks to introduce hearsay to establish that the coal in question is non-unique. He argues that the jurisdiction of equity is solely dependent upon its invocation in the Fourteenth Paragraph of respondent's complaint. Obviously, the complaint contains other allegations of fact upon which the Court is justified in passing its jurisdictional conclusion of law as to the propriety of equitable relief under the facts alleged. The complaint in paragraph 4 (R. page 2) alleges, as petitioner concedes in a footnote:

"Upon entering into these contracts the plaintiff applied for special railroad rates to Texas ports which were granted and for special export licenses outside the regular export allocation system of the U. S. Government for newly mined coal, which were granted."

Petitioner asserts this referred only to the prior contract. *But this contract was made part of the prior contract.* The accepted offer (Exhibit B, R. p. 12) stated "on same terms and conditions and made a continuing part of our recent contract at the same price". (emphasis supplied)

Therefore, the Court of Appeals was fully justified in basing its jurisdictional finding upon the unique character of the coal thus alleged.

In addition to the unique character of the coal which is the first ground of equitable jurisdiction, the respondent has the following independently sufficient grounds for equitable jurisdiction in the instant case. They are: second, the loss of trade, trade standing, reputation, and good will; third, multiplicity of suits; fourth, the impossibility of measuring a portion of the damage.

Petitioner also undertakes,<sup>36</sup> to plead as fact in his brief that which he imagines respondent could have done, claiming that all damage could have been avoided by outside purchasing of coal. This could not be done because (1) non-surplus coal would not satisfy the purchaser, who

<sup>36</sup> Page 73, Pet. Brief.



expected special licensing; and (2) respondent would have been required to assume the risk of purchasing coal at a higher price and thereby risk the uncertainty of a law suit in the Court of Claims to recover it. Yet Petitioner would deny respondents right of opportunity to prove this at trial.

Petitioner also asserts that respondent's "loss of profits as well as its potential liability to its repurchasers could be adequately calculated from the stated terms of the resale to Penn-Pocahontas and the further resale to the Portuguese Government." (Pet. Brief page 76-77.) This is untrue. The loss of reputation due to failure to deliver is not calculable with certainty, even if some of the money damages for the failure were. Moreover, the loss to Portugal by receiving less coal net (due to licensing restrictions) than it had a right to expect would be most difficult to calculate. If an important power plant had to shut down, who can calculate all of the consequential damage?

Petitioner undertakes to plead new "facts" by way of answer in his brief (page 75) as to the uniqueness of the coal. This he does on the hearsay of some anonymous employee of the *Office of International Trade*, purporting to represent to this court that there was no exception ever made for surplus coal in granting export licenses. This is utterly false and erroneous. Respondent can show conclusively at trial the difficulty to which it was put in obtaining export licenses for contracts for previous shipments of similar coal. It can also prove conclusively that the success of high-level negotiations undertaken for special export licenses for the earlier coal, with the *Office of War Mobilization and Reconversion*, depended greatly upon the surplus nature of the coal.

**B. Court of Appeals was correct in finding the export character of the coal to be unique on the pleadings before it.**

Petitioner attacks the Court of Appeals<sup>37</sup> for holding "the peculiar nature of the coal involved soundly bases appellant's (respondent's) resort to equity for relief" and Petitioner argues that this "acknowledges fully all of respondent's contentions to this fact". This finding was, of course, upon the basis of the allegations of the complaint which had to be taken as true on a motion to dismiss. The court was compelled to find all facts as alleged in the complaint. This in no way deprives petitioner of a trial of the fact of uniqueness of the coal, or any other fact alleged in the complaint, at trial. It is to be noted that petitioner in the same section of his brief urges he was entitled to a trial of the merits on the facts, and at the same time argues that respondent should be denied a trial of the facts on the very same question; all of which has been brought about by petitioner's own conduct and voluntary motion to dismiss the complaint before trial. The Court of Appeals could not deprive him of a trial on any fact where they had expressly remanded the case for further proceedings upon reversal of an order dismissing the complaint as they did here.

**III. Petitioner Has No Defense on the Merits.**

Under Point III petitioner undertakes to show that his defense on the merits is "not frivolous or merely colorable".

In order to assert that his claim of breach has substance, petitioner must rely on a very strained interpretation of clear language in the contract. Frivolous as we believe this interpretation to be, even were the contract a novel one, because of the clarity of the language, its frivolity becomes doubly apparent in view of the contrary interpretation adopted by both parties under the earlier contract.

<sup>37</sup> II B, page 78, Pet. Brief.

In the instant case this very same language, by virtue of the construction and practice adopted under the previous identical contracts has already been interpreted, executed, and acted upon by both petitioner and respondent exactly contrary to the way petitioner now wishes to "mis-construe" that very same language.

It strains credulity to see petitioner now claim that his contention has "substance" when he is expressly bound by the opposite construction which he has already given that very same language. (See p. 69, *infra*, for detailed argument of this point.) This is also an attempt to reverse the "burden of proof". Of course, on motion to dismiss, the complaint must be taken in its most favorable light to plaintiff, not to defendant-petitioner.

*Land v. Dollar*,<sup>2</sup> *supra*; *Tahir Erk v. Glenn L. Martin Co.*, *supra*.

Moreover, the Supreme Court is scarcely the forum for the introduction of his factual defenses, if any.

#### **A. Respondent did not breach the contract.**

At the outset, it should be noted that breach, as an affirmative defense should have been asserted by answer; and is available on motion to dismiss only if unmistakably revealed by the complaint. But no breach exists, in any event, unless petitioner can now place a new term in the contract which never existed. He previously claimed that the contract contained an express term requiring respondent "to make a *single* cash payment". (Pet. for Cert. p. 16—Emphasis supplied.) He has now abandoned his position that there was such a term in the contract for an attempt to read it into the contract by interpretation. He now states at page 81 of his brief: "We think it plain from this recital (of various contractual provisions) that the parties' agreement was that respondent would deposit the full \$17,500 in cash in the Dallas Bank *before* any of the coal was *shipped*." This, however, brushes aside the plain meaning of the recital of contract provisions to which he refers.

From the provisions which he quotes at page 80, there can be no doubt that the provision "contract shall be on cash basis based on railroad scale weights as *heretofore* and *payment made upon presentation of your invoices* to same bank in Dallas" was plainly accepted by petitioner. The petitioner admits he replied to respondent that "*your terms* (Respondent's terms) of placing \$17,500 with the First National Bank Dallas, Texas, *for payment upon presentation*" were accepted.

Thus, the terms of placing the money were in point of time aimed only at covering payment *when and only when the weight tickets were presented for payment*, and such weight tickets and invoices could not even be in existence until *after* shipment. It is clear Respondent's only obligation was to have sufficient cash in the hands of the Dallas Bank to cover whenever and whatever invoices and weight tickets were presented by the petitioner as each individual car of coal was loaded and shipped, not only from this contract but also (and this petitioner cannot deny) from his experience under previous contracts (of which the instant was expressly made a part). It is thus manifest there was no obligation that the *full* \$17,500 be placed in the Dallas Bank *before* shipment inasmuch as *payment* was required only *after* shipment.

The Court of Appeals, after careful scrutiny of the facts alleged, drew attention in its opinion to the fact that petitioner had accepted "*your* (respondent's) *terms* of placing \$17,500 with the First National Bank, Dallas, Texas, *for payment on presentation of our* (petitioner's) *invoices*". (Court of Appeal's Opinion at p. 71 *infra*).

In his argument at pages 80 and 81, petitioner quotes several of the printed form provisions of the contract in an effort to prove that no credit had been provided in the instant case. However, each of the provisions which he stresses are rendered inoperative here by their own preface "*unless credit is provided for in the sales memorandum*". There could be no plainer method of providing credit than that provided on the face of this sales memorandum under



the provision labeled "Terms"—"Cash on presentation of weight tickets *as shipped*." This is as much a credit term as "cash thirty days". The weight tickets could not possibly be prepared or presented until after the coal had been loaded, weighed and shipped, which fact petitioner well knew by virtue of the previous contracts of which this was expressly made a continuing part as indicated above. Under the previous contracts respondent can prove that weight tickets couldn't be presented for payment for sixty and ninety days after it had possession of the coal.

Petitioner then fills up pages 81, 82, 83, 84, 85 and part of 86 of his brief with a useless recital of correspondence between respondent petitioner and various banks with respect to placing the \$17,500 in the Dallas Bank before shipment despite the fact that respondent was not required to do so by its contract. The only thing this recital serves to show is that respondent's officers and counsel made repeated but futile attempts to comply with the constantly changing whim and caprice of petitioner in a vain attempt to obtain release of its property, not knowing that petitioner had decided to seek an "out" to its contract and would later be somehow persuaded to attempt a conversion of its property to a most persuasive third party.

**B. Respondent has title to the coal, contrary to petitioner's assertion.**

Petitioner's material on supposed non-passage of title; (P. 87-94, Pet. Brief) has been fully answered *supra* pp. 21 to 38.

**CONCLUSION:**

Wherefore it is respectfully submitted that the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit was correct in law and that its judgment should be affirmed.

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## SPECIAL APPENDIX

### Opinion of the United States Court of Appeals for the District of Columbia:

Before CLARK, WILBUR K. MILLER and PRETTYMAN, JJ.

CLARK, J.: This action originated with a complaint for an injunction filed by the appellant in the District Court of the United States for the District of Columbia on April 29, 1947. Appellee here was named defendant in the complaint in his capacity as War Assets Administrator and Surplus Property Administrator. A temporary restraining order was issued on that date and the cause came on for hearing May 6, 1947, defendant (appellee here) having filed a motion to dismiss. On May 9, 1947, the lower court decreed that the motion for preliminary injunction be denied and granted the motion to dismiss the complaint. This appeal followed.

The facts giving rise to the complaint, briefly stated, are as follows: Appellant had purchased surplus coal from the War Assets Administration during 1946, and early in March 1947 received from the War Assets Administration an invitation to bid on 10,000 tons of coal which stated, "This coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas." On March 13 appellant answered by telegram, offering to buy the coal as offered and requesting that "this tonnage be allocated to us on same terms and conditions and made a continuing part of our recent contract at same price." A letter from the War Assets Administration to appellant under date of March 19 expressed acceptance of the offer, stating in part, "Also, your terms of placing \$17,500 with the First National Bank, Dallas, Texas, *for payment upon presentation of our invoices to said bank are accepted.*" (Italics supplied.) This letter requested that enclosed standard War Assets Administration forms, one being an offer to purchase and the other being a sales memorandum, be executed and returned, which request was complied with by appellant on March 28. Appellant's letter of transmitted accompany-

ing the forms stated that \$5,000 was being deposited at the Dallas bank that day and that the balance of the funds necessary to meet the invoices would be transferred to the Dallas bank when the shipment began.

War Assets Administration replied by telegram on April 1 informing appellant that the entire amount of \$17,500 should be deposited in the Dallas bank prior to noon on April 4 or the sale would be cancelled. Although appellant arranged for an irrevocable letter of credit payable to War Assets Administration through the Dallas bank within the time specified, and so notified War Assets Administration, there was a further interchange of correspondence and on April 16 War Assets Administration informed appellant by telegram that the sale had been cancelled, holding appellant in default for failing to deposit immediately the full amount of \$17,500 in the Dallas Bank.

Subsequently appellant learned that War Assets Administration had entered negotiations with another party for the sale of the coal involved here and filed the complaint, praying for an injunction against the sale of this coal to any person other than the plaintiff (appellant) and seeking a decree upon hearing of the cause that the sale to plaintiff is valid and in effect.

The court below was of the opinion that the complaint did not state a cause of action after expressing openly the view that the suit was, in effect, one for specific performance involving the United States as an indispensable party, and, therefore, that the court lacked jurisdiction.

We have recently had occasion to scrutinize the doctrine of sovereign immunity as a "jurisdictional" problem, and in doing so we deemed it expedient to adopt the careful analysis which had been made previously by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J. v. Tugwell*, 66 App. D. C. 42, 85 F. 2d 208. For its obvious

<sup>1</sup> *Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307, *aff'd*, 330 U. S. 731.

value in this case we repeat his finding, stated (66 App. D. C. 63; 85 F. 2d 229) that:

"Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether necessary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. \* \* \* Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that, when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are so unsubstantial and frivolous as to afford no basis for jurisdiction. . . . (citing *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties."

The words just quoted have real application here. In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir*



*Erk v. Glenn L. Martin Co.*, 116 F. (2d) 865. The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled.

All will concede at the outset that a court has no jurisdiction of a suit against the United States to which the United States has not consented. *United States v. Sherwood*, 312 U. S. 584, 587, 61 Sup. Ct. 767, 85 L. Ed. 1058. That is a ruling doctrine which has long been accepted, as the case cited demonstrates. However, since legal irresponsibility of the Federal Government is derived only by implication from the Constitution, the doctrine has received judicial delimitation which is well established. *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. Therefore, although we may observe that the War Assets Administration functions only as an agency of the United States, it must also be noted that "... the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." - *Keifer and Keifer v. R. F. C.*, 306 U. S. 381, 388, 59 Sup. Ct. 516, 83 L. Ed. 784.

Appellant as complainant below in the suit for injunction, did not seek the court's aid to interfere in the use of official discretion by the appellee. Such discretion was exercised at the time the contract with appellant was entered into. If that contract served to vest title immediately in appellant then it follows that the ruling in *Philadelphia Company v. Stinson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, is controlling here. That ruling was based on a comprehensive review of the authorities, and we quote the language of Mr. Justice Hughes at pages 619 and 620 (omitting citations):

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have

wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has been frequently applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred."

Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee. If so, the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief. The use of the word "surplus" in the description of this coal is a word of art which has an important business connotation. Such coal is obtainable only from appellee and has unique value in that it may be exported under special license outside the limitations imposed by the Government under the export allocation system. Appellant had resold this coal, and the re-purchaser had contracted to export the coal to a foreign government. Newly-mined coal obtainable in the open market would not suffice the purpose of the several contracts involving this surplus coal, since it could be exported only in accordance with the export allocation system.

It is our conclusion that the District Court erred in dismissing the complaint in the belief that it lacked jurisdiction. This cause is remanded to the District Court for further proceedings in accordance with this opinion.

*Reversed and remanded.*